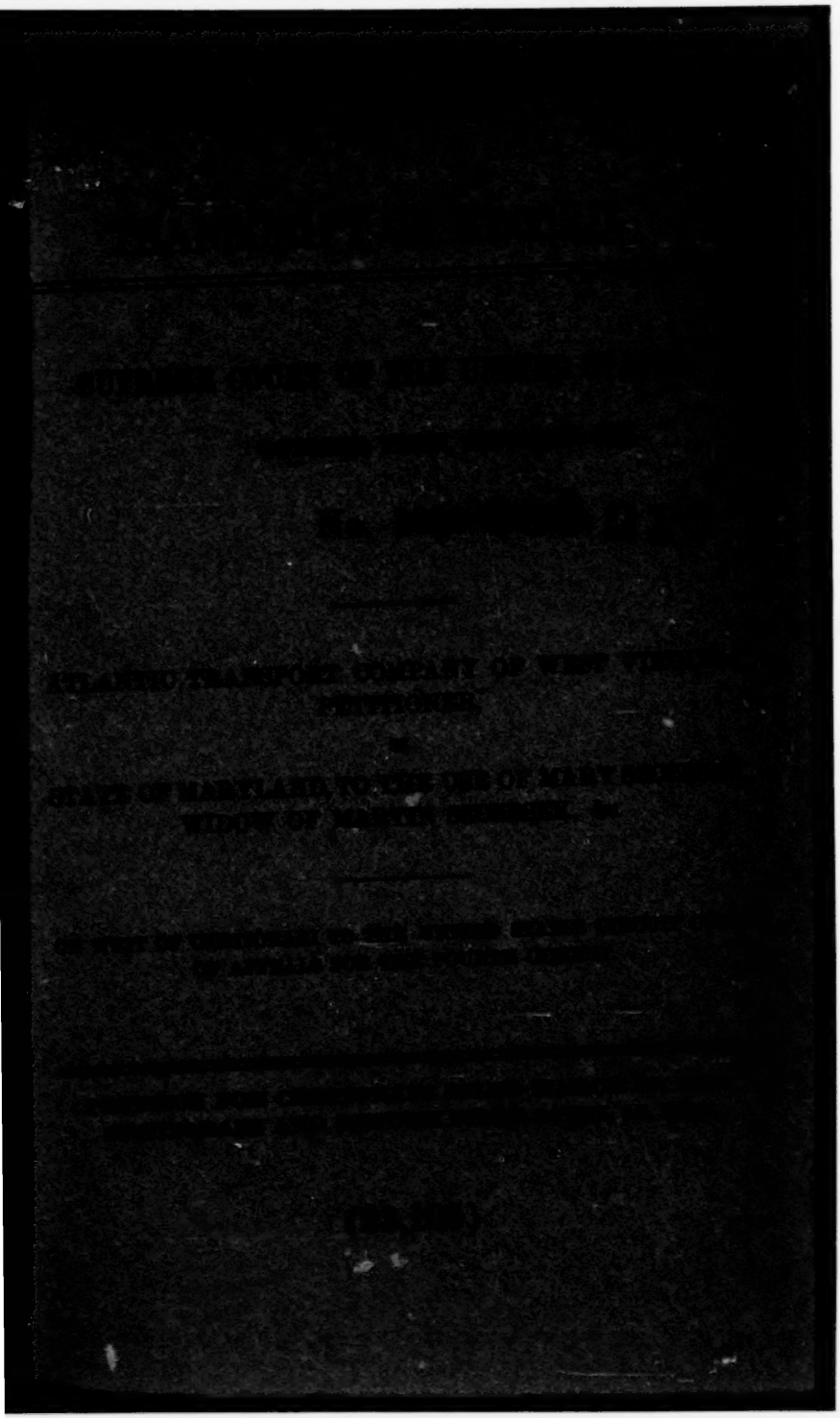

(23,105)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1029

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, PETITIONER,

vs.

STATE OF MARYLAND, TO THE USE OF MARY SZCZESEK, WIDOW OF MARTIN SZCZESEK, &c.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 27, 1912.

TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, } To-wit:

At a District Court of the United States in and for the Maryland District, begun and held at the City of Baltimore on the first Tuesday in June, (being the sixth day of the same month), in the year of our Lord one thousand nine hundred and eleven.

Present: The Honorable Thomas J. Morris, Judge Maryland District; John C. Rose, Judge Maryland District; John Philip Hill, Esq., Attorney; George W. Padgett, Esq., Marshal; Arthur L. Spamer, Clerk.

Among others were the following proceedings, to-wit:

State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased,

vs.

The Hamburg-American Steam Packet Company, a foreign corporation; Captain H. Meyerdirck, Master of the S. S. "Pretoria," and the Lorant Stevedore Company, a body corporate. } In Admiralty.

LIBEL.

(2) Filed November 22, 1910.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased,

vs.

The Hamburg-American Steam Packet Company, a foreign corporation; Captain H. Meyerdirck, Master of the S. S. "Pretoria," and the Lorant Stevedore Company, a body corporate. } In Admiralty.

To the Honorables Thomas J. Morris and John C. Rose, Judges of the United States District Court for the District of Maryland:

(3) The libel and complaint of the State of Maryland, for the use of Mary Szczesek, widow of Martin Szczesek, individually and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie Szczesek, infant children of Martin Szczesek, deceased, residents of the city of Baltimore, in the State of Maryland, against the Hamburg-American Steam Packet Company, a foreign corporation, incorporated under the laws of the Kingdom of Germany; Captain H. Meyerdirck, Master of the S. S. "Pretoria," a non-resident of the District of Maryland, and the Lorant Stevedore Company, a body corporate, duly incorporated under the laws of the State of Maryland, in a cause of damages, civil and maritime, alleges as follows:

First. That at the time of the happening of the wrongs and injuries hereinafter complained of the said Hamburg-American Steam Packet Company was and still is the owner of the S. S. "Pretoria," and that Captain H. Meyerdirck was and still is the Master of the said S. S. "Pretoria." The said S. S. "Pretoria" is not now within the jurisdiction of this Honorable Court.

Second. That heretofore, to-wit, on the 22nd day of August, 1910, the said S. S. "Pretoria" was lying in the Port

of Baltimore, at the dock of the Atlantic Transport Company in said port, for the purposes of loading her cargo at the said port.

Third. That Martin Szczesek, the deceased husband and father of the equitable libellants had been regularly employed by the respondent, the Lorant Stevedore Company, as a stevedore to assist in loading the said steamship at the said Atlantic Transport Company's pier; that he was one of several stevedores working on said date in assisting to load said steamship's cargo.

(4) Fourth. That on or about August 22nd, 1910, at about 10 o'clock at night, Martin Szczesek, deceased, in the regular course of his duties and employment as such stevedore, was in the hold of said vessel assisting in the loading of its cargo, consisting of copper ingots, said cargo being put into the hold of said steamship as follows:

That on the main deck of said steamship, a short distance in front of the fore hatch, were two masts, to which were attached, near their respective bases, booms, which could be lowered or raised so as to place any load being lifted or lowered thereby over the side of the steamship or into the hatch.

That these booms were equipped with cables or ropes, blocks and necessary tackle used in raising or lowering loads to or from the vessel; that the tackle from these booms were shackled together, one boom being placed over the side of the vessel to raise the load from the scow alongside of said steamship, and the other boom being placed directly over the fore hatch of said steamship.

That the copper ingots would be placed in a net sling and raised to a height above the side of the vessel; the cable on that boom would be slackened, and the cable on the boom over the hatchway would then be taken in and the net sling would in this manner be carried over the hatch opening, the two booms remaining stationary; the net sling would then be lowered through the hatch into the hold of the vessel, where the deceased, Martin Szczesek, with other stevedores employed with him, would unhook the said net sling and carry the copper ingots from it and store them in the hold of said steamship, and (5) as these net slings were unloaded they would be attached to the tackle and raised out of the hold of the vessel through the hatch and over the side and lowered into the scow to be filled and returned to the hold of the steamship.

Fifth. That at the time the cargo was being received they were working through the center section of the forward hatchway, on the lowest or bottom deck of the steamship, the fore

section and aft section of this hatch having been left in place, which allowed an opening of about eight feet through which to raise and lower the tackle and sling.

Sixth. That just before the accident alleged a net sling, loaded with copper ingots, had been lowered into the hold of the vessel and had been unhooked from the tackle and the empty sling had been attached thereto; that a deckman standing on the upper deck gave a signal to the engineer operating the tackle to hoist; that the machinery was started, and the net sling on its way up from the hold of said steamship caught on the middle fore and aft socket of the cross beam of the aft section of the hatch and raised said hatch out of its supports, from which it dropped into the hold of the vessel, a distance of, approximately eighteen or twenty feet, upon Martin Szczesek, deceased, and other employees of the Lorant Stevedore Company working in said hold, before the said deceased had an opportunity or chance to get away from under said falling section of the hatch and while the said Martin Szczesek, deceased, was working in the usual, necessary and ordinary location and manner and was exercising due care and caution and was not guilty of any negligence contributing to said accident, and that the said accident was due to the negligence and carelessness of the respondents and their agents in the following particulars:

A. In the failure of the respondents to bolt the hatches left in position during the loading of said steamship—for which provision was made in the construction of the said (6) hatches—to the coamings of the hatchway; that the beams in the construction of the hatches have holes corresponding with holes in the sockets in the coamings, through which bolts were intended to placed, and thus securing the hatches; and that the hatch which fell was not bolted, as alleged.

B. In failing to provide a sufficient opening through the hatchway, through which the net sling was lowered and raised.

C. In negligently using the two derricks aforesaid with tackle shackled together while hoisting or lowering the said net slings through the limited and insufficient opening in the hatchway.

D. In negligently adjusting the position and setting of the boom of the derrick over the hatchway, thereby causing the net sling and tackle to pass too close to the cross beams of said aft section of the forward hatch.

E. In negligently raising the tackle and empty sling from the hold of the vessel at a very rapid rate of speed.

Seventh. Your equitable libellants say that, in consequence of the falling of said aft section of the forward hatch upon the said Martin Szczesek, deceased, he received serious injuries, from which he died about one hour later, as a direct result of said injuries.

Eighth. Your equitable libellants say that it was necessary for said Martin Szczesek to go into the hold of said vessel and come under the opening in said hatchway, and that he had no warning whatever that said opening was insufficient, and that said aft section of the hatch was, therefore, in a defective and dangerous condition, nor could he have known of the dangerous and unsafe condition of said hatchway by the exercise of ordinary care on his part, but that the respondents, the said Hamburg-American Steam Packet Company, Captain H. Meyerdirck, and the Lorant Stevedore Company well knew, or could have known of the insufficient space in said hatchway, of the unsafe and dangerous condition of said hatches, and of the improper placing of the boom over the hatchway, as alleged.

(7)

Ninth. Your equitable libellants say that the respondents failed to provide a reasonably safe and proper place in which the deceased husband and father of these equitable libellants was to work as such stevedore, and by the negligence and carelessness of said respondents the said deceased was exposed to risk and hazard which his employment did not contemplate, and of which he had no warning, and that the said accident was not the result of negligence or want of care on the part of the said deceased, Martin Szczesek, directly thereunto contributing, but was the result of the negligence of the said respondents, as hereinbefore alleged. And for the purpose of recovering damages for said injuries resulting in the death of the said Martin Szczesek, these equitable libellants bring this suit and claim damages to the extent of twenty-five thousand dollars ($25,000.00).

Tenth. Your equitable libellants are very poor, and, because of their poverty, are totally unable to pay the costs of this suit or to give security therefor, and they further aver that they believe they are entitled to the redress they seek in this suit.

Eleventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, your equitable libellants pray for an order that they may be allowed to sue in *forma pauperis*, and that process of monition may issue to the Marshal of the District aforesaid, commanding him to summon the Hamburg-American Steam Packet Company, Captain H. Meyerdirck, Master of the S. S. "Pretoria," and the Lorant Stevedore Company, and that each of them may be required to appear before this Honorable Court and answer, under oath, this libel and all and singular the matters aforesaid, and that if the said Hamburg-American Steam Packet Company and Captain H. Meyerdirck, Master of the S. S. "Pretoria," cannot be found, their goods and chattels, and particularly the S. S. "Patricia," which is owned by (8) the said Hamburg-American Steam Packet Company, and which is now within this district, be attached to the amount sued for and costs; and if sufficient goods and chattels cannot be found, then that their credits and effects be attached, or that the credits and effects of either of them be attached, in the hands of the Atlantic Transport Company, or in such other bodies' corporate or persons' hands that same may be found, to the amount sued for and costs; and that they may be required to answer all and singular the matters aforesaid; and that this Honorable Court will be pleased to decree the payment of damages sustained by your equitable libellants, together with costs; and that they may have such other and further relief as in law and justice they may be entitled to receive.

SEMMES, BOWEN & SEMMES,
Proctors for Libellant.

MARY SZCZESEK.

UNITED STATES OF AMERICA,
District of Maryland. }

Mary Szczesek, being duly sworn, made oath before me, the subscriber, a justice of the peace of the State of Maryland, in and for Baltimore City, this 21st day of November, 1910, that the allegations in the foregoing libel are true, and the libellants are entitled to the redress sought by this suit, to the best of her belief, and that owing to their poverty, they are not able to bear the expenses of this suit or to give the bond and security required, and she further makes oath that the Hamburg-American Steam Packet Company is a foreign corporation, and that Captain H. Meyerdirck is not a citizen of the United States, nor does he reside within the District of Maryland, and that neither of these respondents has an office within the District of Maryland to the best of her knowledge, and that unless the said respondent, the said Hamburg-American Steam

Packet Company's property which is now within the district be attached, she is apprehensive that they will be without redress.

Witness my hand.

C. EDW. SCHAUMLOEFFEL,
Justice of the Peace.

(9) On the foregoing libel and prayer thereof, it is ordered by the District Court of the United States for the District of Maryland this 22nd day of November, 1910:

That the libellants be allowed to sue in *forma pauperis;*

That the officers of this court shall issue and serve all processes and perform all duties in said cause without the libellants being required to prepay the fees for same or give security therefor, and

That the libellants shall have the same remedies as are provided by law in other cases, and

That the warrant of attachment prayed for in the foregoing libel be issued against the goods and chattels, credits and effects of said respondents, as prayed.

THOS. J. MORRIS,
District Judge.

BILL OF PARTICULARS.

(10) This suit is brought to recover damages for the death of the husband and father of the equitable plaintiffs, Mary Szczesek, widow, and Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie Szczesek, infant children of the deceased, who died from fatal injuries received on or about the 22nd day of August, 1910, while he was employed as a stevedore by The Lorant Stevedore Company, and was occupied in assisting to load the steamship "Pretoria," owned by The Hamburg-American Steam Packet Company, of which Captain H. Meyerdirck was and still is master.

The deceased was fatally injured by the falling of the aft section of the forward hatch, caused by a net sling which was being raised from the hold of the vessel being caught on the hatch, lifting it out from its supports and dropping it upon the said Martin Szczesek. That the dropping of said hatch was caused entirely by the negligence of the respondents in this case without any negligence of the deceased thereunto contributing. That the said deceased was the sole support of these libellants, and for the death of the husband and father of these equitable libellants this suit is brought, and damages claimed to the extent of $25,000.

SUMMONS WITH CLAUSE OF FOREIGN ATTACHMENT.

(11) Issued November 22, 1910.

THE UNITED STATES OF AMERICA }
District of Maryland, } to-wit:

The President of the United States of America to the Marshal for the Maryland District—Greeting:

We command you that you summon the Hamburg-American Steam Packet Company, a foreign corporation, Captain H. Meyerdirck, Master of the Steamship "Pretoria" and the Lorant Stevedore Company, a corporation, if they be found in your district, and if they or either of them, can not be so found, that you attach their goods and chattels, and particularly the Steamship "Patricia," which is owned by the said Hamburg-American Steam Packet Company, and which is now within this District, to the amount sued for in the libel hereinafter referred to and costs, and if sufficient goods and chattels cannot be found, then attach their credits and effects or the credits and effects of either of them in the hands of the Atlantic Transport Company or in such other bodies' corporate or persons' lands the same may be found to the amount sued for and cost as aforesaid, to appear before the Judge of the District Court of the United States for the District of Maryland, at the United States Court Room, in the City of Baltimore, on the 8th day of December, next, to answer unto the libel and complaint of the State of Maryland, for the use of Mary Szczesek, widow of Martin Szczesek, individually and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie Szczesek, infant children of Martin Szczesek, deceased, in a cause of damages, and how you shall execute this precept you make known to us in our District Court, for the District aforesaid, and have you then and there this writ.

Witness the Honorable Thomas J. Morris, judge of our District Court, this 22nd day of November, in the year of our Lord, one thousand nine hundred and ten.

Issued 22nd day of November, 1910.

[Seal of Court] ARTHUR L. SPAMER, Clerk.

MARSHAL'S RETURN ATTACHED TO ABOVE SUMMONS.

(12) "The Hamburg-American Steam Packet Company and Captain H. Meyerdirck, Master of the Steamship "Pretoria" not found, summoned the Lorant Stevedore Company, by ser-

vice on James C. Gorman, its manager, and copy summons with clause of foreign attachment left with him, summoned the Atlantic Transport Company, by service on James C. Gorman, its manager, and attached the credits belonging to the Hamburg-American Packet Company, and copy summons with clause of foreign attachment left with him, attached the Steamship "Patricia" and posted copy summons with clause of foreign attachment, November 22, 1910, vessel released on stipulation, November 26, 1910.

GEORGE W. PADGETT,
U. S. Marshal."

PETITION OF LIBELLANTS TO AMEND LIBEL AND ORDER OF COURT THEREON GRANTING THEM LEAVE TO AMEND SAME.

(13) Filed January 17, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antone, infant children of Martin Szczesek, deceased,

vs.

The Hamburg-American Steam Packet Company, a foreign corporation; Captain H. Meyerdirck, Master of the Steamship "Pretoria," and The Lorant Stevedore Company, a body corporate,

In Admiralty.

To the Honorable the Judges of said Court:

The petition of Mary Szczesek, widow, and Joseph, John, Mary, Eva, Stanislaus, Frank and Antone, infant children of Martin Szczesek, libellants in the above entitled cause, respectfully represents unto your Honors:

1. That they filed their libel in the above entitled cause against the Hamburg-American Steam Packet Company, Captain H. Meyerdirck, Master of the steamship "Pre-

toria," a non resident of the said district, and the Lorant Stevedore Company, a body corporate, duly incorporated under the laws of the State of Maryland, to recover for personal injuries resulting in the death of Martin Szczesek, the husband and father of the equitable plaintiffs, received while he was occupied in assisting with the loading of the cargo on the vessel, "Pretoria," as will more fully appear by reference to the libel filed in this case.

That one of the defendants sued was The Lorant Stevedore Company, alleged to be a Maryland corporation; that at the time of filing said libel, your libellants were informed (14) and believed that the said The Lorant Stevedore Company was a corporation; since that time your libellants are informed that there is no such corporation as The Lorant Stevedore Company, but that it is an adjunct, or a department of The Atlantic Transport Company, a West Virginia corporation doing business in this State;

2. Your libellants aver and believe that the deceased was employed at the time of his death by The Atlantic Transport Company, working through its stevedoring department, known as The Lorant Stevedore Company, this being only the name for this particular department of The Atlantic Transport Company;

3. Wherefore your libellants pray leave to amend their libel so as to substitute "The Atlantic Transport Company, a body corporate, duly incorporated under the laws of the State of West Virginia" in the place and stead of "The Lorant Stevedore Company," and they also pray that process of monition may issue to the Marshal of the District aforesaid, commanding him to summon the said The Atlantic Transport Company, and that it may be required to appear before this Honorable Court and answer the libel and amended libel filed herein, and that the said libel may be amended in the following particulars:

a. To amend the opening paragraph of said libel by inserting in the ninth line thereof the name of "The Atlantic Transport Company, a body corporate, duly incorporated under the laws of the State of West Virginia," in the place and stead of "The Lorant Stevedore Company, a body corporate, duly incorporated under the laws of the State of Maryland";

b. To amend paragraph three of said libel, line one on page two, by inserting the name of "The Atlantic Transport Company through its stevedoring department," in the place and stead of "The Lorant Stevedore Company";

c. To amend paragraph six, page 3, line 22, by inserting the name "The Atlantic Transport Company" in the place and stead of "The Lorant Stevedore Company";

(15) d. To amend paragraph 8, page 5, line 11, by inserting the name of "The Atlantic Transport Company" in the place and stead of "The Lorant Stevedore Company";

e. To amend the prayer for process, page 6, line 10, by substituting the name "The Atlantic Transport Company" in the place and stead of "The Lorant Stevedore Company";

And your petitioners will ever pray, &c.

SEMMES, BOWEN & SEMMES,
Proctors for Petitioners.

Leave granted as prayed this 17th day of January, A. D., 1911.

JOHN C. ROSE,
District Judge.

SUMMONS.

(16) Issued January 17, 1911.

THE UNITED STATES OF AMERICA }
District of Maryland, } to-wit:

The President of the United States of America to the Marshal for the Maryland District—Greeting:

We command you that you summon The Atlantic Transport Company, a body corporate, if it be found in your district, to appear before the Judge of the District Court of the United States of America for the District of Maryland, at the United States Court Room in the City of Baltimore, on the 2nd day of February next, to answer unto the libel of the State of Maryland, for the use of Mary Szczesek, widow of Martin Szczesek, individually and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie Szczesek, infant children of Martin Szczesek, deceased, in a cause of damages and how you shall execute this precept you make known to us in our District Court for the District aforesaid, and have you then and there this writ.

Witness the Honorable John C. Rose, Judge of our said District Court, this 17th day of January in the year of our Lord one thousand nine hundred and eleven.

Issued 17th day of January, 1911.

[Seal of Court] ARTHUR L. SPAMER, Clerk.

MARSHAL'S RETURN ENDORSED ON ABOVE SUMMONS.

"Summoned The Atlantic Transport Company, by service on James C. Gorman, its manager, and copy summons left with him, January 19, 1911.

GEORGE W. PADGETT,
U. S. Marshal."

APPEARANCE FOR RESPONDENT.

(17) Filed February 3, 1911.

IN THE COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

State of Maryland, use of Mary Szczesek,
vs.
Hamburg-American Steam Packet Co., Captain H. Meyerdirck and The Atlantic Transport Co. } No. Dkt.

Mr. Clerk:

Enter my appearance as proctor for the Atlantic Transport Co., in the above entitled case.

RALPH ROBINSON.

ANSWER OF THE ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA.

(18) Filed February 17, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased,

vs.

The Hamburg-American Steam Packet Company, a foreign corporation; Captain H. Meyerdirck, Master of the S. S. "Pretoria," and Atlantic Transport Company of West Virginia, a body corporate. } In Admiralty.

To the Honorable Thomas J. Morris and John C. Rose, Judges of the United States District Court for the District of Maryland:

The separate answer of the Atlantic Transport Company of West Virginia to the libel and complaint of State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, etc., against it and others in a cause of damages, civil and maritime, alleges and propounds:

1. Answering the first paragraph of the said libel this respondent says, that inasmuch as the allegations therein set out are not in any way connected with this defense, but concern the liability of certain co-defendants, this respondent neither admits nor denies the same, but leaves the said co-defendants to make such answer as they or either of them may see fit.

2. Answering the second, third and fourth paragraphs of the said libel, this respondent alleges:

That on the date and at the time mentioned in the said (19) libel, Martin Szczesek was not in the employ of this respondent, but this proponent alleges and propounds, upon

knowledge, information and belief that the said Martin Szczesek was in the employ of the Lorant Stevedore Company and was engaged with other employees in loading copper ingots into the steamship "Pretoria" in the Port of Baltimore, substantially in the manner in said paragraphs set out.

And further answering said second, third and fourth paragraphs of the said libel, this respondent alleges that it did not have the requisite corporate power to engage in the business of stevedoring for vessels other than those owned by it, at the time mentioned in the libel as the date of the accident therein mentioned and described, nor has it such corporate power now, nor has it ever had, or lawfully exercised such corporate power.

3. Answering the fifth paragraph, this respondent admits from information, knowledge and belief that the copper ingots were being loaded upon the bottom deck of the said vessel through the centre section of the forward hatchway, but denies that the said opening through which the tackle and sling were raised and lowered was about eight feet, and alleges that the said opening was nine feet two inches in width by sixteen feet in length, and was amply sufficient for the work when prosecuted skilfully and carefully by the said Martin Szczesek and his co-employees.

4. Answering the sixth paragraph of the said libel this respondent admits that the said Martin Szczesek was injured and died shortly thereafter, by the falling of the hatch coverings of the aft section of the hatch in the manner therein al-
(20) leged, but denies that the same was due to its negligence or to that of any of its agents for which it could or ought to be held liable in this cause, and particularly denies:

(A) That it was the duty of this respondent or of its agents to have the said hatches, or any of them, bolted.

(B) That it failed to provide a sufficient opening through the said hatchway for the raising and lowering of the sling.

(C) That it was negligent in using the two derricks aforesaid with tackle shackled together as described in paragraph 4 of the said libel.

(D) That it was negligent in adjusting the position and setting of the boom of the derrick over the hatchway and that the setting of the said derrick caused the said sling and tackle

to pass too close to the cross beams of the said aft section of the forward hatch.

(E) That it is responsible for the injury and subsequent death of the said Martin Szczesek, for the manner in which the said empty sling and tackle was raised from the said hold.

And further answering said sixth paragraph this respondent alleges and propounds, upon information, knowledge and belief:

That the raising and lowering of the said tackle and net was under the exclusive operation and control of the co-employees of the said Martin Szczesek, under the following circumstances, all of which were unreservedly within the knowledge and information of the said Martin Szczesek at the time of his entering, and continuing upon the work in which he was engaged when he sustained the injuries which subsequently caused his death alleged in the libel;

There were located just forward of the hatchway two winches worked by steam, one on the port side and one on the starboard side of the vessel, each operated by co-employees of the said Martin Szczesek. Attached to each winch and a part thereof was a drum, upon which was wound a wire tackle, that the wire tackle on the drum of the winch on the port side was rigged to a boom, by which the copper was lifted over the side of the vessel, and the wire tackle on the starboardside was rigged (21) to a boom by which the copper was lowered into the hold, after it had been lifted over the side and by which also the empty net was raised therefrom; that on the deck and alongside of the open hatchway through which the copper was being loaded was stationed another co-employee of the said Martin Szczesek, whose duty it was to give the signal to the co-employee operating the starboard winch, as to when to start and stop his engine for the purpose of lowering the tackle and net into the hold and raising it therefrom; that as soon as the net loaded with copper was lowered into the hold, it was detached from the tackle by another co-employee and fellow-servant of the Martin Szczesek, working in the gang with him in the hold of the vessel, and an empty net was thereupon attached to the tackle, whereupon the signalman on deck gave the signal to the fellow-servant of the said Martin Szczesek in charge of the starboard winch to haul up.

5. Answering the seventh paragraph of the libel, this respondent says:

That it has no accurate information of the exact character and extent of the injuries sustained by the said Martin Szczesek,

6. Answering the eighth paragraph of the said libel, this respondent alleges upon information, knowledge and belief that the said Martin Szczesek was hired as a stevedore by the Lorant Stevedore Company to engage in loading copper ingots into the hold of the steamship "Pretoria," under the circumstances set out in this answer; that he had long been engaged in the employment of stevedore and was familiar with the work of loading copper ingots, and was fully cognizant of and familiar with the hazards and dangers of said employment; and this respondent denies that said Martin Szczesek had no warning that said hatchway opening was insufficient, if the same was insufficient, which this respondent denies, and this respondent denies that the said aft section of the hold was in a defective and dangerous condition and avers that if the same was in a defective or dangerous or unsafe condition, that said defective dan-
(22) gerous or unsafe condition was unknown to this respondent, and could not have been ascertained by the exercise of reasonable care and diligence on its part; and this respondent denies that the boom was improperly placed over the hatchway.

And further answering the said paragraph this respondent alleges upon knowledge, information and belief that if said hatchway was in a defective, dangerous or unsafe condition, or if the hatchway opening was insufficient, or if the boom was improperly placed over the said opening, these were all facts well within the knowledge and information of the said Martin Szczesek, or could have been readily ascertained by him by the exercise of due care and caution on his part, and having gone to work in the hold of the said vessel, knowing of the defective condition of these appliances or any of them, he thereby assumed the risk of accident because of their said defective and dangerous condition.

7. Answering the ninth paragraph of the said libel, this respondent denies that it failed to provide a reasonably safe and proper place for the said Martin Szczesek to work as stevedore, or that he was exposed to any risk or hazards not contemplated by his employment, and of which he had no warning, and denies that said accident was the result of negligence or want of care on its part.

8. That all and singular the premises are true;

Wherefore this respondent prays that this Honorable Court would be pleased to pronounce against the libel aforesaid and

to condemn the libellant in costs, and otherwise right and justice to administer in the premises.

THE ATLANTIC TRANSPORT COMPANY
OF WEST VIRGINIA,
By P. A. S. FRANKLIN, President.
RALPH ROBINSON,
Proctor for Respondent.

Attest:

J. J. W. McGLONE, Secretary.

(23)

STATE OF NEW YORK,
City of New York, } to-wit:

Before me, the subscriber, a notary public of the State of New York in and for the City of New York, duly commissioned and qualified, personally appeared this 16th day of February, 1911, P. A. S. Franklin, the president of the Atlantic Transport Company of West Virginia, and made oath in due form of law that the matters and facts set out in the aforegoing answer are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

F. W. RIDGWAY,
Notary Public,
Notary Public, Kings County,
Certificate filed in New York County.

[Notary's Seal]

ANSWER OF THE HAMBURG-AMERICAN STEAM PACKET COMPANY.

(24) Filed June 2, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased,

vs.

The Hamburg-American Steam Packet Company, a foreign corporation; Captain H. Meyerdirck, Master of the S. S. "Pretoria," and the Atlantic Transport Company of West Virginia, a body corporate.

} In Admiralty.

To the Honorable Thomas J. Morris and John C. Rose, Judges of the United States District Court for the District of Maryland:

The separate answer of the Hamburg-Amerikanische Packet Fahrt Actien Gasellshaft, herein sued as the Hamburg-American Steam Packet Company, to the libel and complaint of State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, etc., against it and others in a cause of damages, civil and maritime, alleges and propounds:

1. Answering the first paragraph of the said libel, this respondent says, that it was and still is the owner of the Steamship "Pretoria," mentioned therein as the property of the Hamburg-American Steam Packet Company, and that Captain H. Meyerdirck was and still is the master of said steamship "Pretoria," and that said Steamship "Pretoria" is not now and was not at the time the libel in this cause of action was filed and attachment thereon issued, within the jurisdiction of this Honorable Court.

(25) 2. Answering the second paragraph of the said libel, this respondent admits the facts therein stated.

3. Answering the second, third and four paragraphs of said libel, this respondent admits upon knowledge, information and belief the matters and facts therein stated to be substantially true, as therein stated.

4. Answering the fifth paragraph this respondent admits from information, knowledge and belief that the copper ingots were being loaded upon the bottom deck of the said vessel through the centre section of the forward hatchway, but denies that the said opening through which the tackle and sling were raised and lowered was about eight feet, and alleges that the said opening was nine feet two inches in width by sixteen feet in length, and was amply sufficient for the work when prosecuted skillfully and carefully by the said Martin Szczesek and his co-employees.

5. Answering the sixth paragraph of the said libel, this respondent admits that the said Martin Szczesek was injured by the failure of the hatch coverings of the aft section of the hatch in the manner therein alleged, but denies that the same was due to its negligence or to that of any of its agents for which it could or ought to be held liable in this cause; and particularly denies:

(A) That it was the duty of this respondent or of its agents to have the said hatches, or any of them, bolted.

(B) That it failed to provide a sufficient opening through the said hatchway for the raising and lowering of the sling.

(C) That it was negligent in using two derricks aforesaid with tackle shackled together as described in paragraph 4 of the said libel.

(26) (D) That it was negligent in adjusting the position and setting of the boom of the derrick over the hatchway and that the setting of the said derrick caused the said sling and tackle to pass too close to the cross beams of the said aft section of the forward hatch.

(E) That it is responsible for the injury to the said Martin Szczesek for the manner in which the said empty sling and tackle was raised from the said hold.

And further answering said sixth paragraph this respondent alleges and propounds, upon information, knowledge and belief:

That the raising and lowering of the said tackle and net was under the exclusive operation and control of the co-employee of the said Martin Szczesek, under the following circumstances, all of which were unreservedly within the knowledge and information of the said Martin Szczesek at the time of his entering, and continuing upon, the work in which he was engaged when he sustained the injuries alleged in the libel.

There were located just forward of the hatchway two winches worked by steam, one on the port side, and one on the starboard side of the vessel, each operated by co-employees of the said Martin Szczesek. Attached to each winch and a part thereof was a drum, upon which was wound a wire tackle; that the wire tackle on the drum of the winch on the port side was rigged to a boom, by which the copper was lifted over the side of the vessel, and the wire tackle on the starboard side was rigged to a boom by which the copper was lowered into the hold, after it had been lifted over the side and by which also the empty net was raised therefrom; that on the deck and alongside of the open hatchway through which the copper was being loaded was stationed another co-employee of the said Martin Szczesek, whose duty it was to give the signal to the co-employees operating the starboard winch, as to when to start and stop his engine for the purpose of lowering the tackle and net into the hold and raising it therefrom; that as soon as the net loaded (27) with copper was lowered into the hold, it was detached from the tackle by another co-employee and fellow servant of the said Martin Szczesek, working in the gang with him in the hold of the vessel, and an empty net was thereupon attached to the tackle, whereupon the signalman on deck gave the signal to the fellow servant of the said Martin Szczesek in charge of the starboard winch to haul up.

5. Answering the 7th paragraph of the libel, this respondent says:

That it has no accurate information of the exact character and extent of the injuries sustained by the said Martin Szczesek.

6. Answering the 8th paragraph of the said libel, this respondent alleges upon information, knowledge and belief that the said Martin Szczesek was hired as a stevedore by the Atlantic Transport Company to engage in loading copper ingots into the hold of the steamship "Pretoria," under the circumstances set out in this answer; that he had long been engaged in the employment of stevedore and was familiar with the work of loading copper ingots, and was fully cognizant of and familiar with the hazards and dangers of said employment;

and this respondent denies that said Martin Szczesek had no warning that said hatchway opening was insufficient, if the same was insufficient, which this respondent denies, and this respondent denies that the said aft section of the hold was in a defective and dangerous condition, and avers that if same was in a defective, or dangerous, or unsafe condition that said defective, dangerous or unsafe condition was unknown to this respondent, and could not have been ascertained by the exercise of reasonable care and diligence on its part; and this respondent denies that the boom was improperly placed over the hatchway.

And further answering the said paragraph this respondent alleges upon knowledge, information and belief that if said hatchway was in a defective, dangerous or unsafe condition, or if (28) the hatchway opening was insufficient, or if the boom was improperly placed over the said opening, these were all facts well within the knowledge and information of the said Martin Szczesek, or could have been readily ascertained by him by the exercise of due care and caution on his part, and having gone to work in the hold of the said vessel, knowing of the defective condition of these appliances or any of them he thereby assumed the risk of accident because of their said defective and dangerous condition.

7. Answering the ninth paragraph of the said libel, this respondent denies that it failed to provide a reasonably safe and proper place for the said Martin Szczesek to work as stevedore, or that he was exposed to any risks or hazards not contemplated by his employment, and of which he had no warning, and denies that said accident was the result of negligence or want of care on its part.

8. And this respondent further alleges and propounds, that upon the arrival of its said Steamship "Pretoria" in the harbor of Baltimore, it turned over the same to the Atlantic Transport Company, independent contractors, engaged in the business of stevedoring, for the purpose of unloading such cargo as remained in the said Steamship "Pretoria" (part of which had been discharged at the Port of Boston) and of loading such part of her cargo as was to be received in the City of Baltimore, and that the said Martin Szczesek was not in the employ of this respondent at the time of the happening of the matters and facts alleged to have occurred on the 22nd day of August, 1910, or at any other time.

9. And this respondent says that this court is without jurisdiction to hear and determine this case, because this case

was instituted under Article 67 of the Code of Public General Laws of the State of Maryland, of 1904, and under this article this court is not authorized to assess and divide the damages.

10. And that all and singular the premises are true.

Wherefore this respondent prays this Honorable Court may be pleased to pronounce against the libel aforesaid and to discharge the bond filed in this cause to secure the release of the Steamship "Patricia," and to condemn the libellant in (29) costs, and otherwise right and justice to administer in the premises.

HAMBURG-AMERIKANISCHE PACKET
FAHRT ACTIEN GESELLSCHAFT,
By EMIL L. BOAS,
Resident Director & General Manager.
RALPH ROBINSON,
Proctor for respondent.

STATE OF NEW YORK,
City of New York, } to-wit:

I hereby certify that on this 1st day of June in the year nineteen hundred and eleven, before me, the subscriber, a notary public of the State of New York in and for the City of New York aforesaid, duly commissioned and qualified, personally appeared Emil L. Boas, and made oath in due form of law that he is the Resident Director and General Manager for the Hamburg-Amerikanische Packet-fahrt Gesellschaft, and that the matters and facts set forth in the aforegoing answer are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

[Notarial Seal]

F. C. WACKEROW,
Notary Public,
Notary Public,
New York County, No. 190,
Registered No. 2216.

DECREE DISMISSING LIBEL AGAINST THE HAMBURG-AMERICAN STEAM PACKET COMPANY.

(170) Filed June 2, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased,

vs.

The Hamburg-American Steam Packet Company, a foreign corporation, Captain H. Meyerdirck, Master of the S. S. "Pretoria," and Atlantic Transport Company of West Virginia, a body corporate. (In Admiralty.)

This cause having been heard on the pleadings and proofs and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had, and it appearing to the court that the libellant has no cause of action against the Hamburg-Amerikanische Packet Fahrt Actien Gasellschaft, herein sued as Hamburg-American Steam Packet Company, for the injuries alleged in the libel;

It is now ordered, adjudged and decreed by the court this 2nd day of June, 1911, that the libel as against above mentioned respondent be dismissed with costs to be taxed against the libellant, and on motion of the proctors for the defendant, Hamburg-American Steam Packet Company;

It is further ordered that unless an appeal be taken from this decree within the time limited by law and prescribed by the rules of this court, the stipulation filed for the release of the vessel attached in these proceedings, namely, the Steamship "Patricia" be, and the same is, hereby cancelled.

JOHN C. ROSE,
District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

(187)

State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, infant children of Martin Szczesek, deceased,
vs.
The Hamburg-American Steam Packet Company, a foreign corporation, Captain H. Meyerdrick, Master of the S. S. Pretoria, and The Atlantic Transport Company of West Virginia, a body corporate.
} In Admiralty.

ROSE, District Judge:

This is a libel filed on behalf of the widow and infant children of Martin Szczesek. The deceased was working with Frank Imbrovek, the libellant in the aforegoing case. He received fatal injuries in the same accident in which Imbrovek was hurt. The cases were tried together.

For the reasons therein stated I find that his death resulted from negligence of the Atlantic Transport Company. In this case that company set up the additional defense that admiralty has no jurisdiction to enforce the Maryland form of Lord Campbell's Act. For the reasons stated in my opinion in the case of State of Maryland to the use of Pryor, et al. *vs.* Miller, et al., 180 Fed., 796, this defense is overruled.

The deceased was forty years of age. He leaves a wife and five children, the eldest of whom is sixteen, the youngest three years. He earned about ten dollars a week. An allowance of $4,500 to his widow and children in the aggregate would be fair and reasonable.

I will hear the proctors for the libellants further as to the proper division of this sum among the widow and children.

DECREE AGAINST THE ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA.

(188) Filed June 28, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, infant children of Martin Szczesek, deceased,
vs.
The Atlantic Transport Company of West Virginia, a body corporate, et al. } In Admiralty.

DECREE.

This cause standing ready for a hearing, and the witnesses having been examined in the presence of the court and the proceedings read, heard and considered, and it appearing to the court that the libellants are entitled to recover from the Atlantic Transport Company of West Virginia damages resulting from the injuries sustained by Martin Szczesek, now deceased, and which damages amount in the entirety to forty-five hundred dollars ($4,500.00);

It is adjudged, ordered and decreed this 28 day of June, 1911, by the District Court of the United States for the District of Maryland, that the Atlantic Transport Company of West Virginia, pay to Mary Szczesek, the widow of Martin Szczesek, the sum of twenty-five hundred dollars $2,500.00), to Joseph and John Szczesek, two of the infant libellants, the sum of two hundred and fifty dollars each, and to Mary, Eva and Stanislaus Szczesek, three of the infant libellants, the sum of five hundred dollars each, or to their proctors, together with interest thereon until paid, and their costs to be taxed. And it is further adjudged, ordered and decreed that unless the said Atlantic Transport Company of West Virginia within ten days from the date of this decree pay to the said libellants, or their proctors the respective sums hereinbefore decreed to them and the costs of their suit, execution for the enforcement of this decree may issue against the defendant, the Atlantic Transport Company of West Virginia, on behalf of any or all
(189) of the libellants.

JOHN C. ROSE,
District Judge.

PETITION OF RESPONDENT FOR APPEAL, ASSIGNMENT OF ERRORS AND ORDER OF COURT THEREON ALLOWING APPEAL.

(190) Filed July 6, 1911.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased,
vs.
The Atlantic Transport Company of West Virginia.

To the Honorable John C. Rose, Judge of the United States District Court:

The petition of the Atlantic Transport Company of West Virginia, respondent in the above entitled case, prays that it may be allowed an appeal to the Circuit Court of Appeals for the Fourth Circuit, from the decree passed in said case, bearing date the 27th day of June, 1911, and that a proper citation may be issued and served upon Mary Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased, or on their proctor or proctors, and that the record of the proceedings in said case be transmitted to said Circuit Court of Appeals, and that the said decree be reversed, and a decree entered in favor of your petitioner, dismissing said libel with costs.

Your petitioner files the following assignment of errors:

1. That it was error on the part of the District Court in holding that admiralty had jurisdiction of the cause of action against the stevedore.

1½. That it was error on the part of the District Court in holding that admiralty had jurisdiction to assess the damages in behalf of the equitable plaintiffs, and to apportion them

between the mother and the children of the decedent under the provisions of Article 67 of the Public General Laws of the State of Maryland.

(191) 2. That it was error on the part of the District Court in finding that there was evidence showing that one of the recognized uses of the pins was to prevent accidents such as that which happened.

3. That it was error on the part of the District Court in holding that it was negligence on the part of the stevedore to omit putting the pins in.

4. That it was error on the part of the District Court in finding that the possibility of an accident like the one in question was obvious.

5. That it was error on the part of the District Court in holding that the gang boss was a vice-principal.

6. That is was error on the part of the District Court in finding that there was any evidence to show a lack of supervision over the gang boss.

7. That it was error on the part of the District Court in holding that Bartthol was a vice-principal.

8. That it was error on the part of the District Court in finding or assuming that no orders had been issued by the stevedore to its foreman or gang bosses to the effect that they were not to allow the men to work under partly covered hatches, unless the pins were in.

9. That it was error on the part of the District Court in holding that the burden of proof was on the stevedore to show that it had issued orders to its foreman or gang bosses that they were not to allow the men to work under partly covered hatches unless the pins were in.

10. That it was error on the part of the District Court in finding that the stevedore did not give a thought to the pins.

11. That it was error on the part of the District Court in holding that because the stevedore did not give a thought to the pins, it neglected a duty which it owed to the said Mar-
(192) tin Szczesek.

12. That it was error on the part of the District Court in finding that the mat might have caught had the shackles been properly hooked.

13. That it was error on the part of the District Court in holding that the accident to the said Martin Szczesek and his consequent death resulted from the negligence of the stevedore.

14. That it was error on the part of the District Court in holding that the burden of showing that the negligence of a fellow servant of the said Martin Szczesek contributed to the accident was on the respondent.

15. That it was error on the part of the District Court in holding that the accident to the said Martin Szczesek and his consequent death did not happen by reason of the negligence of his co-servant.

16. That it was error on the part of the District Court in sustaining the libel, and in decreeing in favor of the equitable plaintiffs the sum of $4,500.00 with interest from June 27th, 1911, and costs in said case.

17. That it was error on the part of the District Court in not decreeing in favor of this petitioner and dismissing the libel in this case.

RALPH ROBINSON,
EDW. DUFFY,
Proctors for Petitioner.

Upon the aforegoing petition it is by the United States District Court for the District of Maryland.

Ordered this sixth day of July, in the year nineteen hundred and eleven, that the appeal prayed for be and the same is hereby allowed. The appeal bond for the stay of execution and for costs is fixed at the sum of six thousand dollars ($6,000).

JOHN C. ROSE,
District Judge.

Service of copy admitted this 6th day of July, 1911.

SEMMES, BOWEN & SEMMES,
Proctors for Libellant.

APPEAL BOND.

(193) Filed July 6th, 1911.

Know all men by these prents:

That we, the Atlantic Transport Company of West Virginia, a corporation duly incorporated under the laws of the State of West Virginia, as principal, and American Bonding Company of Baltimore, a corporation of Maryland, of Baltimore, Maryland, as surety, are held and firmly bound unto State of Maryland, to the use of Mary Szczesek, and Joseph, John, Mary, Eva and Stanislaus Szczesek, in the full and just sum of six thousand dollars ($6,000), to be paid to the said State of Maryland, to the use of Mary Szczesek, and Joseph, John, Mary, Eva and Stanislaus Szczesek, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves and our respective successors, jointly and severally, by these presents. Sealed with our seals and dated this 6th day of July, in the year of our Lord one thousand nine hundred and eleven.

Whereas lately at a District Court of the United States in and for the District of Maryland, in a suit depending in said court between State of Maryland to the use of Mary Szczesek et al. and the Atlantic Transport Company, a decree was rendered against the said Atlantic Transport Company, and the said Atlantic Transport Company having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said widow, Mary Szczesek and Joseph, John, Mary, Eva and Stanislaus Szczesek, infants, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Fourth Circuit to be holden at Richmond on the day in the said citation mentioned:

Now, the condition of the above obligation is such, that if the said Atlantic Transport Company shall prosecute its appeal to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void;
(194) else to remain in full force and virtue.

In testimony whereof the aforesaid Atlantic Transport Company of West Virginia has hereto set its corporate name by the hand of its president, and has hereunto affixed its corporate seal, duly attested by its secretary; and the aforesaid surety has hereto set its corporate name by the hand of its

president, and affixed its corporate seal, duly attested by its secretary the day and year first above written.

THE ATLANTIC TRANSPORT COMPANY
[Seal of the A. T. Co.] OF WEST VIRGINIA,
By P. A. S. FRANKLIN, President.

Attest:

J. J. McGLONE, Secretary.

AMERICAN BONDING COMPANY
[Seal of the A. B. Co.] OF BALTIMORE,
By JAS. T. WILSON,
Agent and Attorney in fact.

Attest as to surety:

JOHN G. SCOTT.

Approved—

JOHN C. ROSE,
District Judge.

CITATION.

UNITED STATES OF AMERICA, } *ss:*.

The President of the United States to the State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, individually, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie Szczesek, infant children of Martin Szczesek, deceased,—Greeting:

(195) You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, on the 4th day of August, next, pursuant to an appeal from a decree of the District Court of the United States for the District of Maryland in your favor passed in a cause in said court wherein the Atlantic Transport Company of West Virginia, a corporation, is respondent, and you are libellant, to show cause, if any there be, why the decree rendered against the said respondent in

said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland this 6th day of July, in the year of our Lord, one thousand nine hundred and eleven.

{Seal of Court}

JOHN C. ROSE,
District Judge.

Attest:

ARTHUR L. SPAMER,
Clerk of said District Court.

Service of the within citation acknowledged this 10th day of July, 1911.

SEMMES, BOWEN & SEMMES, Proctors.

ORDER TO TRANSMIT RECORD.

(196) And, thereupon, it is ordered by the court here that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste: ARTHUR L. SPAMER, Clerk.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
District of Maryland, } to-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do certify that the foregoing is a true transcript of the record and proceedings of the said District Court, together with all things hereunto relating in the therein entitled case.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 31st day of July, 1911.

{Seal of Court}

ARTHUR L. SPAMER, Clerk.

STIPULATION.

Filed Aug. 5, 1911.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE FOURTH CIRCUIT.

State of Maryland, to the use of Mary Szczesek, et al.,
vs.
The Atlantic Transport Company of West Virginia, et al.

Inasmuch as the above entitled case and the case of Frank Imbrovek *vs.* Atlantic Transport Company of West Virginia, et al., now on appeal in the above entitled court, were tried together in the lower court, and inasmuch as the evidence in both cases is the same, it is, therefore, stipulated by counsel for the respective parties, that the clerk in printing the record in the above entitled case, need not print the evidence, and inasmuch as the opinions of the lower court in the above two cases were so closely connected that the clerk in certifying the record on appeal has inserted in the records in each of the above two cases, the opinions of the court in both, it is, therefore, stipulated between counsel for the respective parties, that the clerk in printing the record in the above entitled case need not print the opinion of the lower court in the Imbrovek case.

SEMMES, BOWEN and SEMMES,
Proctors for Appellee.
BOND, ROBINSON & DUFFY,
Proctors for Appellant.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
versus
STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin Szczesek, and as Mother and Next Friend of Joseph and Other Infant Children of Martin Szczesek, Deceased, Appellee.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

August 4, 1911, transcript of record is filed and cause docketed.
Same day, appearance of Edward Duffy for the appellant, and the appearance of W. H. Price, Jr., C. K. Mount, John E. Semmes, Jesse N. Bowen and John E. Semmes, Jr., for the appellee, entered, orders filed.
Sept. 2, 1911, twenty copies of the printed record are filed.
December 16, 1911, (November Term, 1911,) cause is continued to the February Term, 1912, by the court.
February 8, 1912, (February Term, 1912,) cause came on to be heard before Goff and Pritchard, Circuit Judges, and Dayton, District Judge, and is argued, together with case No. 1058, by counsel, and submitted.
February 20, 1912, (Same Term) court announced and filed its opinion, which is as follows, to-wit:

Opinion.

Filed February 20, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
versus
STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin Szczesek, and as Mother and Next Friend of Joseph and Other Infant Children of Martin Szczesek, Deceased, Appellee.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

[Argued February 8, 1912. Decided February 20, 1912.]

Before Goff and Pritchard, Circuit Judges, and Dayton, District Judge.

Ralph Robinson and Edward Duffy (Nicholas P. Bond on the Brief) for Appellant, and John E. Semmes, Jr., (John E. Semmes and Jesse N. Bowen on the Brief) for the Appellee.

STIPULATION.

Filed Aug. 5, 1911.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE FOURTH CIRCUIT.

State of Maryland, to the use of Mary Szczesek, et al.,
vs.
The Atlantic Transport Company of West Virginia, et al.

Inasmuch as the above entitled case and the case of Frank Imbrovek *vs.* Atlantic Transport Company of West Virginia, et al., now on appeal in the above entitled court, were tried together in the lower court, and inasmuch as the evidence in both cases is the same, it is, therefore, stipulated by counsel for the respective parties, that the clerk in printing the record in the above entitled case, need not print the evidence, and inasmuch as the opinions of the lower court in the above two cases were so closely connected that the clerk in certifying the record on appeal has inserted in the records in each of the above two cases, the opinions of the court in both, it is, therefore, stipulated between counsel for the respective parties, that the clerk in printing the record in the above entitled case need not print the opinion of the lower court in the Imbrovek case.

SEMMES, BOWEN and SEMMES,
Proctors for Appellee.
BOND, ROBINSON & DUFFY,
Proctors for Appellant.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
versus
STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin Szczesek, and as Mother and Next Friend of Joseph and Other Infant Children of Martin Szczesek, Deceased, Appellee.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

August 4, 1911, transcript of record is filed and cause docketed.

Same day, appearance of Edward Duffy for the appellant, and the appearance of W. H. Price, Jr., C. K. Mount, John E. Semmes, Jesse N. Bowen and John E. Semmes, Jr., for the appellee, entered, orders filed.

Sept. 2, 1911, twenty copies of the printed record are filed.

December 16, 1911, (November Term, 1911,) cause is continued to the February Term, 1912, by the court.

February 8, 1912, (February Term, 1912,) cause came on to be heard before Goff and Pritchard, Circuit Judges, and Dayton, District Judge, and is argued, together with case No. 1058, by counsel, and submitted.

February 20, 1912, (Same Term) court announced and filed its opinion, which is as follows, to-wit:

Opinion.

Filed February 20, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
versus
STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin Szczesek, and as Mother and Next Friend of Joseph and Other Infant Children of Martin Szczesek, Deceased, Appellee.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

[Argued February 8, 1912. Decided February 20, 1912.]

Before Goff and Pritchard, Circuit Judges, and Dayton, District Judge.

Ralph Robinson and Edward Duffy (Nicholas P. Bond on the Brief) for Appellant, and John E. Semmes, Jr., (John E. Semmes and Jesse N. Bowen on the Brief) for the Appellee.

Per Curiam:

We find no error in the record of this cause. We refer to the opinion of the learned judge below, who entered the decree complained of, which fully accords with the views of this court. 190 Fed., 240.

Affirmed.

February 26, 1912, (Same Term), the court made and entered the following decree, to-wit:

Decree.

Filed and Entered February 26, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,

vs.

STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin Szczesek, and as Mother and Next Friend of Joseph and Other Infant Children of Martin Szczesek, Deceased, Appellee.

Appeal from the District Court of the United States for the District of Maryland.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court, in this case, be, and the same is hereby, affirmed, with costs.

NATHAN GOFF.

February 26th, 1912.

Petition of Appellant to Stay Mandate.

Filed March 9, 1912.

In the United States Court of Appeals for the Fourth Circuit.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA
vs.
FRANK IMBROVEK.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA
vs.
STATE OF MARYLAND to the Use of MARY SZCZESEK, Widow of Martin Szczesek, in Her Individual Capacity and as Mother and Next Friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, Infant Children of Martin Szczesek, Deceased.

To the Honorable the Judges of said Court:

The petition of the Atlantic Transport Company of West Virginia respectfully shows:

That it is about to file in the Supreme Court of the United States a petition for a writ of certiorari in the above two cases; that it served a copy of said petition for said writ of certiorari on counsel for the appellees on March 8th, 1912, giving them notice that on Monday, March 25th, 1912, at the opening of court on that day, or as soon thereafter as counsel can be heard, it will move the Supreme Court of the United States to grant the said writ of certiorari.

Wherefore your petitioner prays that the mandates of this court in the above two cases be withheld until the Supreme Court of the United States passes on the question as to whether or not it will grant the writ of certiorari as aforesaid.

EDW. DUFFY,
Counsel for Petitioner.

STATE OF MARYLAND,
City of Baltimore, To wit:

I hereby certify that on this 8th day of March, in the year nineteen hundred and twelve, before me, the subscriber, a Notary Public of the State of Maryland in and for Baltimore City aforesaid, duly commissioned and qualified, personally appeared Edward Duffy, counsel for the petitioner, and he made oath in due form of law that the matters and facts set out in the aforegoing petition are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

[NOTARIAL SEAL.]

EDWARD P. HILL,
Notary Public.

Order Staying Mandate.

Filed and Entered March 9, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
vs.
STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin Szczesek, and as Mother and Next Friend of Joseph and Other Infant Children of Martin Szczesek, Deceased, Appellee.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

Upon the petition of the appellant, by its counsel, Edward Duffy, and for good cause shown,

It is ordered that the mandate of this court in the above case be, and the same is hereby, stayed pending the application of the appellant for a writ of certiorari in the Supreme Court of the United States, provided said application is filed in the said Supreme Court by April 2, 1912.

NATHAN GOFF,
Circuit Judge, Presiding.

March 9, 1912.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 11th day of March, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk of the United States Circuit Court of Appeals, Fourth Circuit.

In the United States Circuit Court of Appeals for the Fourth Circuit.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,

vs.

STATE OF MARYLAND to the Use of MARY SZCZESEK, Widow of Martin Szczesek, in Her Individual Capacity and as Mother and Next Friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, Infant Children of Martin Szczesek, Deceased, Appellees.

It is hereby stipulated and agreed that the certified transcript of the Record in the above entitled case heretofore filed in the Supreme Court of the United States may be taken as the return to the writ of certiorari granted by the Supreme Court of the United States in the above entitled case.

EDW. DUFFY,
Proctor for Appellant.
JOHN E. SEMMES, JR.,
Proctor for Appellees.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of counsel is a true copy of the original filed April 13, 1912, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 13th day of April, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals for the Fourth Circuit.

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 10th day of April, 1912, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the certified transcript of the Record in the above entitled case heretofore filed in the Supreme Court of the United States may be taken as the return to the writ of certiorari granted by the Supreme Court of the United States in the above entitled case.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 13th day of April, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals
for the Fourth Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Atlantic Transport Company of West Virginia is appellant, and State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased, is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Maryland, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 10th day of April, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 23105. Supreme Court of the United States. No. 1029, October Term, 1911. Atlantic Transport Co. of West Virginia, vs. State of Maryland to the use of Mary Szczesek, widow, etc. Writ of Certiorari. The Execution of the within writ appears from the schedules thereunto annexed. Henry T. Meloney, Cl'k U. S. Cir. Ct. Appeals.

[Endorsed:] File No. 23105. Supreme Court U. S., October Term, 1911. Term No. 1029. Atlantic Transport Co. of West Virginia vs. State of Maryland to the use of Mary Szczesek, widow, etc. Writ of certiorari and return. Filed April 15, 1912.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,

Petitioner,

215

v.

No. 1020.

FRANK IMBROVEK,

Respondent.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,

Petitioner,

216

v.

No. 1020.

STATE OF MARYLAND, TO THE USE OF MARY SZCZESEK, WIDOW OF MARTIN SZCZESEK, IN HER INDIVIDUAL CAPACITY AND AS MOTHER AND NEXT FRIEND OF JOSEPH, JOHN, MARY, EVA, STANISLAUS, FRANK AND ANTONIE, INFANT CHILDREN OF MARTIN SZCZESEK, DECEASED,

Respondents.

Petition for Writ of Certiorari and Brief in Support Thereof.

NICHOLAS P. BOND,
Of Counsel for Petitioner.

BOND, ROBINSON & DUFFY,
Counsel.

KING BROS., PRS., 413 E. Lexington St.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,

Petitioner,

vs.

FRANK IMBROVEK,

Respondent.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,

Petitioner,

vs.

STATE OF MARYLAND, TO THE USE OF MARY SZCZESEK, WIDOW OF MARTIN SZCZESEK, IN HER INDIVIDUAL CAPACITY AND AS MOTHER AND NEXT FRIEND OF JOSEPH, JOHN, MARY, EVA, STANISLAUS, FRANK AND ANTONIE, INFANT CHILDREN OF MARTIN SZCZESEK, DECEASED,

Respondents.

To the Above-Named Respondents:

PLEASE TAKE NOTICE, That under the rules of the Supreme Court of the United States I shall file the annexed petition for writ of *certiorari* in the Supreme Court of the

United States, together with printed copies thereof, and copies of the records of the two cases referred to in said petition, numbered 1058 and 1059, and I shall on Monday, the 25th day of March, 1912, at the opening of Court on that day, or as soon thereafter as counsel can be heard, move the Court to grant the writ of *certiorari*, as in said petition prayed.

NICHOLAS P. BOND,
Of Counsel for Petitioner.

BOND, ROBINSON & DUFFY,
Counsel.

WE HEREBY ADMIT, That on the eighth day of March, 1912, a copy of this notice, together with a copy of the petition for a writ of *certiorari* and the Brief annexed hereto, was served upon us.

SEMMES, BOWEN & SEMMES,
Counsel for Above-Named Respondents.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,

Petitioner,

vs.

FRANK IMBROVEK,

Respondent.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,

Petitioner,

vs.

STATE OF MARYLAND, TO THE USE OF MARY SZCZESEK, WIDOW OF MARTIN SZCZESEK, IN HER INDIVIDUAL CAPACITY AND AS MOTHER AND NEXT FRIEND OF JOSEPH, JOHN, MARY, EVA, STANISLAUS, FRANK AND ANTONIE, INFANT CHILDREN OF MARTIN SZCZESEK, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

Your Petitioner, Atlantic Transport Company of West Virginia, a corporation organized and existing under the laws

of the State of West Virginia, respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, thereby commanding the said Court to certify and send to this Court on a certain day to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the cases therein pending, entitled "Atlantic Transport Company of West Virginia, Appellant, *vs.* Frank Imbrovek, Appellee, No. 1058," and "Atlantic Transport Company of West Virginia, Appellant, *vs.* State of Maryland, to the Use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased, Appellees, No. 1059," to the end that the same may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeal and to define and regulate, in certain cases, the jurisdiction of the Courts of the United States, and for other purposes," approved March 3rd, 1891, and that your Petitioner may have such other and further relief in the premises as to this Court may seem proper and in conformity with said Act; and that the decrees of the Circuit Court of Appeals and of the District Court in each of said cases, and every part thereof may be reversed by this Honorable Court.

And your petitioner, in support of this its petition, respectfully represents and alleges the following reasons:

First—That the above two cases arose out of the injury to Frank Imbrovek and the death of Martin Szczesek, said injury and death being the result of the same accident, said two cases having been tried together in the United States District Court for the District of Maryland, sitting in admiralty, and argued together in the United States Circuit Court of Appeals for the Fourth Circuit.

Second—That Imbrovek and Szczesek were stevedores in the employ of the Atlantic Transport Company, a corporation which carried on the stevedoring business; that at the time of the accident the Transport Company was engaged in loading the steamship "Pretoria" belonging to the Hamburg-American Steam Packet Company, while tied to her pier in the Harbor of Baltimore; that in each case a libel was filed against the Transport Company and the Packet Company, charging them with responsibility for the injury to Imbrovek and the death of Szczesek, by reason of their negligence; that the District Court dismissed the libel in each case as to the Packet Company; that by the dismissal of the libels against the Packet Company, two questions were left in each case, viz:

(1) Has a Court of Admiralty jurisdiction over a case brought by a stevedore against his employer for the negligence of the employer in failing to furnish the stevedore with a safe place in which to work, where the work is being done on board a steamship tied to a pier, *the stevedore having no contractual relation with the steamship, her master or owner?*

(2) Did the master fail to furnish a safe place?

Third—That the District Court, Judge Rose, determined the first question in the affirmative upon two grounds, namely:

(1) That inasmuch as the tort occurred on a vessel in navigable waters, it was within the jurisdiction of a Court of Admiralty, because locality is the sole and exclusive test of jurisdiction in admiralty with respect to torts, and that the nature of the tort and the relation of the parties to each other, to the ship and to the locality have no bearing on the question.

(2) That conceding *gratia arguendi* that locality is not the sole and exclusive test then admiralty has jurisdiction, because the claims of stevedores are essentially maritime in their nature and are within the jurisdiction of a Court of Admiralty.

That this question was determined in the negative on both points by the Circuit Court of Appeals for the Ninth Circuit Gilbert and Ross, Circuit judges, and Hawley, district judge (Campbell vs. Hackfeld, 125 Fed. Rep. 696, cited with approval in The Blackheath, 195 U. S. 367), where it was held:

(*a*) That locality was not the sole and exclusive test, but the relation of the parties must also be taken into consideration, and it also held,

(*b*) That the claim of a stevedore against his employer where the *stevedore had no contractual relation with the ship, its master or owner,* was not of a maritime nature.

That locality *is not* the sole and exclusive test of jurisdiction of admiralty with respect to torts is unquestionably the finding of this Court in the following cases:

The Blackheath, 195 U. S. 369;
Simmons vs. The Jefferson, 215 U. S. 130;
Martin vs. West, 222 U. S. 191.

Fourth—That the District Court determined the second question in the affirmative; that the District Court for the Southern District of New York (The Picqua, 97 Fed. Rep. 649), under precisely similar circumstances, held that the master was not liable.

Fifth—That the United States Circuit Court of Appeals for the Fourth Circuit, by Goff and Prichard, Circuit judges, and Dayton, district judge, affirmed the decision of Judge Rose on both questions without filing any opinion.

Your petitioner, therefore, alleges that on the questions involved in this case there is a difference of opinion between the different Circuit Courts of Appeal, and your petitioner, therefore, submits, for the reasons herein set forth and those more at large stated in the brief herein filed that the questions involved in these cases make it proper that this Court should grant the writ of *certiorari* as prayed.

And your petitioner will ever pray, etc.

NICHOLAS P. BOND,
Of Counsel for Petitioner.

BOND, ROBINSON & DUFFY,
Counsel.

STATE OF MARYLAND,
Baltimore City, to wit:

I hereby certify that on this 8th day of March, nineteen hundred and twelve, personally appeared before me, a notary public of the State of Maryland in and for Baltimore City aforesaid, Edward Duffy, and made oath in due form of law that he is of counsel for the Atlantic Transport Company, of West Virginia, and that the matters and facts set forth in the aforegoing petition are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal the day and date last above written.

(Seal)

EDWARD P. HILL,
Notary Public.

I hereby certify that I have examined the aforegoing petition and in my opinion the petition is well founded and

the case is one in which the prayer of the petitioner should be granted by this Court.

NICHOLAS P. BOND,
Of Counsel for Petitioner.

BRIEF FOR PETITIONER.

In this brief we shall not attempt to argue the question as to whether these cases were properly decided, but shall content ourselves with endeavoring to show that because of the diversity of opinion on the questions involved in these cases this Court should finally settle these questions.

The libel in each of these cases is filed by the libellant against the Hamburg-American Steam Packet Company, Captain H. Meyerdirk, Master of the Steamship "Pretoria" belonging to the Packet Company, and the Atlantic Transport Company, Meyerdirk was never summoned. A writ of foreign attachment was prayed for, and under it the Steamship "Patricia" belonging to the Packet Company was seized. Each libel charges the same acts of negligence, to wit:

1. That it was the duty of the respondents to bolt the hatches.

2. That the respondents were negligent in failing to provide a sufficient opening through which the net was lowered and raised.

There were other acts of negligence charged, but the proof was confined to the above two. The evidence in both cases will be found Record 1058, pages 20 to 83.

The District Court dismissed the libel in each case against the Packet Company, and held the Transport Company liable in the amount of forty-five hundred dollars ($4,500.00) in each case.

The principal errors assigned were:

1. That it was error to hold that admiralty had jurisdiction.

2. That it was error to hold that the accident happened by reason of the negligence of the Transport Company.

The first question is, therefore:

1. Has a Court of admiralty jurisdiction over a case brought by a stevedore against his employer for the negligence of the employer in failing to furnish the stevedore with a safe place in which to work where the work is being done on board a steamship tied to a pier, *the stevedore having no contractual relation with the steamship, her master or owner.*

On this question the District Court in its opinion, which will be found in Record No. 1058, pages 85 to 96, says on page 87:

> "As the case stands on the pleadings and proofs the libellant must show: (2) That the Court of admiralty has jurisdiction."

On page 88 of the Record, JUDGE ROSE says:

> "The jurisdiction over torts depends on locality and not on the nature or origin of the wrong done."

And after an elaborate discussion of the question, he concludes, that because the accident happened on navigable waters, admiralty has jurisdiction. The Circuit Court of Appeals concurred in the result arrived at by Judge Rose, without giving its reasons therefor.

This Court has recently said that the question as to whether a tort is maritime, "must be resolved according to locality *and the character of the injured thing.*" (Martin vs. West, 222 U. S. 191, 197.)

So also in the Blackheath, 195 U. S. 361, this Court sustained the jurisdiction in admiralty because of the nature of the thing injured, and not alone on the locality of the tort.

The doctrine of these last two cases is applied by the Ninth Circuit to a case like the present.

In that Circuit in the case of Campbell vs. Hackfeld, 125 Fed. Rep. 696 (which is cited with approval in The Blackheath, *supra*), GILBERT and Ross, Circuit Judges, and HAWLEY, District Judge, speaking through JUDGE Ross, say:

> "This cause comes here on appeal from a decree of the District Court for the District of Hawaii sustaining an exception of the appellee to the jurisdiction of the Court over the parties or the cause of action stated in the libel, and dismissing the libel, without prejudice, for want of jurisdiction. The libellant was a stevedore, and the libellee a corporation engaged in the business of loading and unloading vessels at Honolulu. The libel shows that in pursuance of its business the libellee on the 26th day of July, 1902, undertook to unload a cargo of coal from the Norwegian bark Aeolus, then anchored in navigable waters of the port of Honolulu, and that the libellant was one of the libellee's employees engaged in that work; that while so engaged in the hold of the vessel the libellant was, by reason of the carelessness of the libellee and of other of its employees, severely injured, for which injury he asked damages. Not only does the libel fail to allege anything against the ship, its owner, officers or crew, but it affirmatively alleges 'that the persons who were engaged in the unloading of said bark Aeolus were all employees of said

defendant, and not members of the crew, or employees of said bark Aeolus, and not fellow servants of any capacity with any of the employees of said bark Aeolus. Instances are numerous in which stevedores have maintained libels for injuries sustained by reason of defective machinery or appliances of the ship, or by reason of the negligence of its owner or of some of its officers or crew. Many of such cases are referred to in The Anaces, 93 Fed. 240, and in the briefs of counsel in the present case. But no case has been cited, and it is asserted by counsel that no case can be found, where a stevedore was allowed to maintain in a Court of admiralty an action for damages, against the stevedore who employed him, for injuries sustained by reason of the negligence of the head stevedore, or of one or more of his other employees. The mere fact that no such case can be found in the books tends strongly to show that they are outside the acknowledged limit of admiralty cognizance over marine torts, for it would be little short of absurd to suppose that there have not been hundreds and hundreds of instances where stevedores have been injured in their work through the negligence of the contracting stevedore or of some of his employees."

The Court then takes up and discusses fully the question involved, and finally concludes as follows:

> "We are of opinion that the ruling of the Court below was right, and it is not in conflict with any previous decision of which we are aware, and that it in no way tends to unsettle any rule of admiralty, or to introduce into that branch of the law any complication or uncertainty."

It will, therefore, be perceived, that the Circuit Court of Appeals for the Ninth District arrived at a different conclu-

sion from that arrived at by the Fourth Circuit in the present cases.

It was contended by the respondents that the present case differs from the Hackfeld case in that here you have a libel filed against both the owner of the ship and the Stevedore Company, and that as admiralty clearly has jurisdiction in the action against the owner, it would, therefore, have jurisdiction against the owner and the Stevedore Company jointly. Even had the owner been held responsible (if the Hackfeld decision is correct), it would not be possible to hold the Stevedore Company, for if it did not commit a maritime tort, it is not possible for the respondents to make it maritime by anything they might do. If a Court has not jurisdiction over one party, it is not possible to give it jurisdiction by joining another party with him. In this case, however, it will be found from the evidence that the respondents did not attempt to offer any evidence to show that the ship was in any way guilty of negligence, and in consequence thereof the libel as to the ship was dismissed, so that if the Hackfeld decision is correct, there was never any question of maritime tort in the case other than the allegation of the libel attempted to make one.

This contention of the respondents was based on the Clan Graham, 153 Fed. Rep. 977. In this case the District Court for the District of Oregon, Wolverton, District Judge, held: That under Admiralty Rule 46 the Court may permit the joinder in an action in tort for a personal injury of a claim *in rem* against a vessel and one *in personam* against stevedores, although the latter are neither master nor owner of the vessel when the injury is alleged to have resulted from the joint negligence of both, and the joinder will best subserve the ends of justice.

It will be noted by this Court, however, that in this case the question of jurisdiction was not raised.

JUDGE ROSE further says (Record, page 93):

> "The tort complained of occurred on navigable waters and on board of a ship. The parties to it were engaged at the time in work absolutely essential to the business of the ship in navigating the seas. The tort alleged is the failure of one of them to use due care in protecting the other from the dangers of that work. It would seem that such a tort is clearly maritime."

And as authority for this proposition he cites:

Norwegian S. S. Co. vs. Washington, 57 Fed. 224;
The Maine, 51 Fed. 954;
The John Shay, 81 Fed. 216.

It has long been a question in the various Courts as to whether the contract of a stevedore with the *ship, its owner or master* is a maritime contract. The earlier decisions held that it was not. It was thereafter held that the stevedore had a lien upon the ship if the loading took place in a foreign port. Now the Courts are gradually getting around to the doctrine that such a contract is maritime. The three cases last mentioned are cases of this sort, namely, cases where the stevedore had a contract with the ship, its owner or master, and they, therefore, held that the contract was in its nature maritime. They did not involve the question involved in the case of Campbell vs. Hackfeld or in this case. In the present case neither Imbrovek nor Szczesek had a contract with the ship, its owner or master. Their contract was with the Transport Company.

The second question is:

Did the master fail to furnish a safe place?

While we feel that the Circuit Court of Appeals failed to properly apply the doctrine of master and servant so clearly

laid down by this Court in the cases of Alaska Mining Co. vs. Whelan, 168 U. S. 86, and B. & O. R. R. Co. vs. Baugh, 149 U. S. 368, to the facts of this case; and while the District Court for the Southern District of New York, in The Picqua, 97 Fed. Rep. 649, on practically the same state of facts, arrived at a different conclusion, yet we shall say no more on this question, for we appreciate the fact that if this Court does not feel that it should issue the writ because of the diversity of decisions on the jurisdictional question, it should not be burdened in seeing that the law applicable to employer and employee is properly applied, especially when the rule which governs a particular case depends so largely on the facts of that case.

We, therefore, submit that by reason of the diversity of decisions on the jurisdictional question involved in this case, that this is a case in which this Court should grant the writ as prayed.

Respectfully submitted.

NICHOLAS P. BOND,
Of Counsel for Petitioner.

BOND, ROBINSON & DUFFY,
Counsel.

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FILED.

MAR 28 1912

JAMES H. McKENN

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 214 215

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, PETITIONER,

vs.

FRANK IMBROVEK, RESPONDENT.

No. 216

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, PETITIONER,

vs.

STATE OF MARYLAND TO THE USE OF MARY SZCZESEK, WIDOW OF MARTIN SZCZESEK, in her Individual Capacity and as Mother and Next Friend of JOSEPH, JOHN, MARY, EVA, STANISLAUS, FRANK AND ANTONIE, Infant Children of MARTIN SZCZESEK, Deceased, RESPONDENTS.

BRIEF FOR RESPONDENTS.

JOHN E. SEMMES, JR.,
Of Counsel for Respondents.

SEMMES, BOWEN AND SEMMES,
Counsel.

KING BROS., PRS., 413 E. Lexington St.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 1028.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, PETITIONER,

vs.

FRANK IMBROVEK, RESPONDENT.

No. 1029.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, PETITIONER,

vs.

STATE OF MARYLAND TO THE USE OF MARY SZCZESEK, WIDOW OF MARTIN SZCZESEK, in her Individual Capacity and as Mother and Next Friend of JOSEPH, JOHN, MARY, EVA, STANISLAUS, FRANK AND ANTONIE, Infant Children of MARTIN SZCZESEK, Deceased, RESPONDENTS.

BRIEF FOR RESPONDENTS.

STATEMENT.

The libels in these cases were filed against the Hamburg-American Steam Packet Company, a foreign corporation, with a writ of foreign attachment, and against the Atlantic Transport Company, a corporation which was conducting a stevedoring business. The Master of the steamship "Pretoria," belonging to the Packet Company, was also named as

joint respondent. There was a return of "*non est*" as to him. The testimony adduced on behalf of the libellants showed negligence on the part of the Hamburg-American Steam Packet Company, as well as the Atlantic Transport Company. It was, however, upon the testimony produced by the Atlantic Transport Company, that the Steam Packet Company was [redacted] exonerated and the libel dismissed as to it.

The question of whether or not a Court of Admiralty would have jurisdiction of a suit for damages brought by a stevedore against a stevedore company **alone** *was not before the District Court.* We respectfully call the attention of this Honorable Court to these facts, inasmuch as the diversity of decisions, as stated by the petitioners, in reality rests upon the one decision of *Campbell vs. Hackfeld & Co.*, 125 Fed. Rep. 696. All the other decisions which a most diligent search has revealed, definitely decide that *locality is the sole test of the jurisdiction of admiralty over torts.* The Hackfeld case is clearly distinguishable from the one at bar, in that the libel in that case was filed by a stevedore against a stevedore company, without joining the ship and its owners, and the Court uses this language (page 697):

> "Not only does the libel fail to allege anything against the ship, its owner, officers or crew, but it affirmatively alleges 'that the persons who were engaged in the unloading of said bark Aeolus were all employees of said defendant and not members of the crew or employees of said bark Aeolus, and not fellow servants of any capacity with any of the employees of said bark Aeolus.'"

The Court thus based its decision on the ground that the allegations of the libel had not only failed to join the ship or its officers or crew in any manner, but that it was distinctly alleged that the latter were in no way liable for the injury.

We will not, therefore, burden this Honorable Court with an enumeration of the unbroken line of authorities (for more than fifty years) which support the jurisdiction of admiralty in a case such as the present one.

We respectfully submit that there is no diversity of decisions upon the jurisdictional question involved in this case, and that this Honorable Court should deny the writ, as prayed.

JOHN E. SEMMES, JR.,
Of Counsel for Respondents.

SEMMES, BOWEN AND SEMMES,
Counsel.

Supreme Court of the United States

October Term, 1917

No. 102

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA

vs.

FRANK IMBROVEK

No. 103

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA

vs.

STATE OF MARYLAND TO THE USE OF MARY SZCZEBEK, WIDOW OF MARTIN SZCZEBEK, ET AL.

ON CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

NICHOLAS P. BOND,
RALPH ROBINSON,
EDWARD DUFFY,
Counsel for Petitioner.

BYRD BROTHERS, PRINTERS, BALTIMORE, MD.

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Supreme Court of the United States

OCTOBER TERM, 1913.

No. 215.

ATLANTIC TRANSPORT COMPANY
OF WEST VIRGINIA.

vs.

FRANK IMBROVEK.

No. 216.

ATLANTIC TRANSPORT COMPANY
OF WEST VIRGINIA

vs.

STATE OF MARYLAND TO THE USE OF MARY
SZCZESEK, WIDOW OF MARTIN SZCZESEK,
ET AL.

BRIEF FOR PETITIONER.

STATEMENT OF FACTS.

The Steamship "Pretoria," belonging to the Hamburg American Steam Packet Company, arrived in port not later than Saturday prior to the Monday on which the accident happened. The evidence does not show however on what day she did arrive.

The Hatches.

The hatch openings measured thirty feet fore and aft, and sixteen feet athwartship. Across this opening were placed two heavy iron beams running athwartship, each of these beams weighing about 1600 pounds. These beams fitted in sockets on the hatch combing. Through the end of each beam was a hole with a corresponding hole in the hatch combing, through which holes bolts could be placed, which would make the beam immovable. These beams were placed ten feet apart, thus dividing the hatch opening into three equal sections or spaces, each ten feet by sixteen feet. Across each of these openings were placed the fore and afters, made of wood, such resting on small projections on the beams. On the fore and afters were placed the hatch covers.

The Loading Apparatus.

This consisted of the winches on deck and the booms rigged with pulleys. Through the pulleys ran a rope, one end of which wound around the winch while to the other end there was attached a hook with a lip to it. The load to be lifted was placed in a net or mat, which was hung on the hook by means of shackles. This net consisted of two mats of tarred rope laid face to face, each about five feet square and about six inches thick. The net was so arranged that when it hung on the hook loaded, it spread out, but when it was empty, it folded up like a book. When so folded, it was five feet long and about one foot thick.

The Stevedores and Their Duties.

Imbrovek and Szczesek (hereafter referred to as libellants), were stevedores in the employ of the Transport Company, a corporation, carrying on the stevedoring business and each of them was a leader or sort of sub-foreman. When the ship came in, and as soon as the custom officials were through with her, the stevedores took possession of her, as

was the custom. Bartholl, the head foreman, sent on her various gangs of stevedores, each under a foreman or gang boss. It was the duty of each gang to take possession of a hatch and remove the covers, fore and afters, and beams to such extent as it deemed necessary. In doing this, if the bolts were in they would remove them, if they so desired, and place them alongside of the combing, to be collected by the ship's carpenter. If thereafter the stevedores wished these bolts, they would call on the ship's carpenter for them. Each gang consisted of a foreman, two winchmen and a signal man, who were placed on deck, and of nine men in the hold, eight of these men in the hold attended to the loading, and were stationed four on each side of the ship. One of each four was a leader of his particular part of the gang. The ninth man in the hold was the net man, his sole duty being to hook and unhook the net and to steady it as it would go on its upward journey. Lenk was the foreman of the gang to which the libellants belonged, and each of the libellants was a leader.

The Method Employed.

At the time of the accident, the gang was loading the ship with only the centre section of the hatch uncovered. The beams were in and not bolted. The fore and afters and hatch covers of this section were piled on the other two sections. On Saturday prior to the accident, and all day Monday, Bartholl had a gang working through this centre section with the covers similarly situated, but there was no evidence to show whether the bolts were in or not.

The Accident.

A loaded net had been lowered and unhooked when the net man hooked on an empty net and gave the signal to go ahead. As the net went up, it, in some way not shown by the evidence, caught on the projection in the athwartship

iron beam, on which projection the fore and after was intended to rest, jerked the beam out of its sockets, and the beam, together with the fore and afters and hatch covers which it supported, fell to the hold below, thus injuring Imbrovek and Szczesek. The latter afterwards died. The accident happened about ten o'clock P. M. The gang to which the libellants belonged had gone on duty at 6 P. M.

What Happened After the Accident.

After the accident the mate of the ship, together with Weber and Mayerowicz, two of the stevedores, went below to look at the beams, when this conversation took place: The mate said:

"Look, there is nothing the matter with this beam. The beam is all right, because maybe the Company is going to blame us, the ship, and you see now it is not our fault."

Weber said:

"If that cross beam was bolstered, it would not have come out," and the mate said:

"Yes, you are right, but if the foreman had let me know I would have sent the carpenter and put the bolts in, and in that way they would never have come out;"
and then Weber said:

"You had charge of that;"
and the mate said:

"No, we did not know what section the stevedore was going to take out; they can take out the cross piece if they want to. We have nothing to do with that."

The Cause of the Accident.

There was no evidence to show how the net came to catch on the projection, but Bartholl, the head foreman, who was not on duty or present on the ship at the time of the accident, testified that he had been stevedoring 17 years, and

that the net was so made that it could not have caught unless the net man had permitted one of the shackles to hang loose instead of putting it on the hook; that in his opinion the net man had allowed one of the shackles to hang loose, and this shackle had caught on the projection. That even in such a case the net could not have caught had the net man steadied it.

Lack of Evidence

There was no evidence to show when the bolts had been removed, or which particular stevedore or gang of stevedores had removed them, or to show that the libellants were not experienced workmen, or that they needed instructions of any kind as to the dangers of the work. The evidence in fact showed that Imbrovek had been stevedoring nine years. There was no evidence to show what were the duties of Bartholi, other than those which might be assumed from the facts that he was head foreman; that he had sent the various gangs on board after the arrival of the ship, and that he had a gang in the hatch working on Saturday and all day Monday. There was no evidence to show what were the duties of Lenk, the foreman of the gang to which the libellants belonged, other than that what might be assumed from the fact of his being foreman. There was no evidence to show whether the Transport Company had issued any instructions to its employees as to the method of doing the work or whether they were not to work with the beams in, unless bolted. There was no evidence to show that there was anything wrong with the construction of the ship or her condition at the time of the accident.

There are seventeen assignments of error (Imbrovek, Record, p. 99-101), but the principal ones are, that it was error—

(*a*) to hold that admiralty had jurisdiction;

(*b*) to hold that the accident happened by reason of the negligence of the Transport Company.

ARGUMENT.

POINT I.

Admiralty has not Jurisdiction.

The first question is: Has a Court of Admiralty jurisdiction over a case brought by a stevedore against his employer for the negligence of the employer in failing to furnish the stevedore a safe place in which to work, where the work is being done on board a steamship tied to a pier, the stevedore having no contratural relation with the steamship, her master or owner?

The United States Circuit Court of Appeals for the Fourth Circuit in this case holds that a Court of Admiralty has jurisdiction, and while the Court of Appeals rendered a *per curiam* opinion herein, we must assume that its reasons were the same as those set forth by District Judge Rose in the opinion filed by him.

The United States Circuit Court of Appeals for the Ninth Circuit in Campbell vs. Hackfeldt, 125 Fed. 696, holds that admiralty has not jurisdiction. The reasons for this holding will be found in the opinion of that Court delivered by Judge Ross.

Judge Rose says (Record p. 88): "Jurisdiction over torts depends on locality and not on the nature or origin of the wrong done." And again (Record p. 92): "It would seem that such a tort is clearly maritime. If maritime, it is in any event, and under any general theory of jurisdiction, within the cognizance of a Court of Admiralty."

The first question which we will, therefore, discuss is:

A.

Is locality the sole test of jurisdiction, that is to say, is every tort which is committed on navigable waters cognizable in admiralty solely because it was so committed?

No doubt there are many expressions by Federal Judges which would lead one to suppose so, if such expressions are disassociated from the facts of the case being decided. Let us suppose, that on a steamer while plying the Potomac River one passenger slanders another. Has admiralty jurisdiction in the case? If it has, then everything said in this brief on the jurisdiction of that Court is worthless. If it has not, then there is room for the contention herein made. Justice Storey rendered his masterly opinion in De Lovio vs. Boit, 2 Gall. 399 in 1815. He states (399-404) that the Admiralty Court is of a very high antiquity; that it has been distinctly traced from the time of Edward I; that the original nature and extent of its jurisdiction cannot now with absolute certainty be known, as it is involved in the same obscurity as the original jurisdiction of the Courts of Common Law; that the admiralty of England and the maritime Courts of all the other powers of Europe were formed upon one and the same common model, and that their jurisdiction included the same subjects as the consular Courts of the Mediterranean, as described in the *Consolato del Mare*. The learned Justice then traces the early history of this jurisdiction through the Black Book, the laws of Oleron, the ordinances passed in the reigns of King John and Edward I, and with regard to the Black Book he states:

> "It contains an ample view of the crimes and offenses cognizable in admiralty, and also occasional ordinances and commentaries upon matters of prize and maritime torts, injuries, and contracts."

He sets forth (p. 400) the jurisdiction of the Consular Courts as described in the *Consolato del Mare*, and it is to be noted that no jurisdiction as to torts is mentioned, but the broadest jurisdiction as to contracts of a maritime nature is given.

The original Black Book was found after the first volume of Twiss was issued. It is divided into five parts: Nos. A, B, C, the Laws of Oleron, and No. D. It was compiled not earlier than the reign of Henry VI. There are documents in it which were drawn up antecedent to the reign of Edward III, Nos. A and B are attributed to the early part of the reign of Edward III, No. C contains ordinances which purport to have been made in the reign of Henry I, Richard I, John and Edward I; the laws of Oleron were first used in England in the reign of Edward II (3 Twiss, Black Book of Admiralty, pp. IX-XI).

The contents of Part A (1 Twiss, p. 3) are described (1 Twiss, p. XLII) as concerning the administrative duties of the admiralty in time of war.

The contents of Part B (1 Twiss, p. 24) are described (1 Twiss XLIII) as ordinances for the government of the admiral in the enemy's country and rules for the maintenance of naval discipline at sea before arriving in the enemy's country.

The contents of Part C (1 Twiss, p. 40) are described (1 Twiss, p. XLIV-LVII). By an inspection of Part C it will be found that it deals with crimes and offences as a general rule, but it contains some matters of interest herein.

Sections 4 and 5 (p. 45, 47) make a person cutting the cable or removing the anchor of a ship responsible to the owner if the ship is thereby lost.

Section 21 (p. 69) which is the ordinance passed by Edward I at Hastings, provides that any contract made between merchant and merchant or merchant and mariner beyond the seas or within the flood mark shall be tried before the admiral, and nowhere else. (Twiss states in a note that this would seem to be the true starting point of admiralty jurisdiction in civil suits). Section 31 p. 83 provides for a fine on persons suing at common law any merchant, mariner or other person for anything of ancient right belonging to maritime law.

The origin of the Law of Oleron (1 Twiss, p. 89) is described (1 Twiss, p. LVII). By an inspection of these laws it will be found that the only torts therein mentioned are collisions, (Section 15, p. 109) damage to one ship by the anchor of another (Section 16, p. 111) and the negligence of a pilot (Sections 33 and 34, p. 127-129), and it is interesting to note that Section 6 (p. 95) provides that if a mariner is injured in the service of a ship he is to be healed at the cost of the ship.

Part D (1 Twiss, p. 133) is the inquisition taken at Queensborow in 1375. This inquisition deals almost entirely with wages of mariners, whereas the addition to this inquisition (1 Twiss, p. 149) which was adopted in the reign of Henry IV or thereafter (1 Twiss, p. LXXI) deals with various crimes and offenses and not with torts.

Sections 51 and 52 (p. 163) of this inquisition are interesting herein. They provide that inquiry be made concerning those who sue at common law for a thing belonging of *ancient right* to the maritime law and concerning judges who hold pleas *of right* belonging to the admiralty Court.

It will, therefore, be noted that all of these ancient documents just discussed deal to a very limited extent with torts, and that the torts with which they do deal are in every case in their nature maritime.

There is one fact, however, which must be kept in mind in order to understand the English decisions. We refer to the venue. In a common law Court, locality was the basis of jurisdiction. The judge was a county judge and the venue had to be laid originally in the hundred and later in the county where the cause of action arose, and the jury which tried the case must come from that county. In the earliest time all causes of action were local. In the course of time, however, there crept into the law from necessity the distinction between local and transitory actions. Thereafter a transitory action could be brought where the defendant was

found; but in order to get jurisdiction over a foreign transitory action a fiction was finally devised under which the action must be stated to have arisen in its true locality, to which was added under a videlicet, the place where the action was brought, and this latter statement could not be traversed. To such an extent was this carried, that if a suit were brought at common law for the seizure of a ship on the high seas, the pleading stated that the ship was taken on the high seas, to wit, at Cheapside in London, and the defendant was not allowed to prove that Cheapside was not on the high seas.

Bacon's Abridg. "Actions Local and Transitory."
McKenna vs. Fiske, 1 How. 240, 247.
R. vs. Keyn, 2 Ex. D. 63, 169.
Mostyn vs. Fabrigas, 1 Smith L. Cases (11 Ed.) 591.
Gilbert's Practice (3 Ed.) 84-85.
British South Africa Co. vs. The Companhia, etc., Appeal Cases (1893), 602, 617, 631.

Twiss states (Vol. 4, p. VII) that a Court sat in the borough of Ipswich from tide to tide to administer the law maritime to passing mariners, as early as the reign of King John (A. D. 1200), and no doubt this Court tried all causes of action which arose without the bodies of counties or in foreign lands irrespective of their nature, for otherwise there was no Court which had jurisdiction, and so it is that we find Edward I at Hastings by that statute referred to by Justice Storey (page 402) declaring every contract between merchant and merchant or merchant and mariner beyond the sea or within the flood mark shall be tried before the admiralty and not elsewhere, thus attaching to the maritime jurisdiction of the admiralty a jurisdiction over suits on contracts which at that time were probably not cognizable in a common law Court. The date when this fiction was adopted seems to be involved

in doubt, but there is some evidence that it was in existence in the time of Edward III (Skinner's Case, 6 State Trials 712, 719) and also in the time of Edward I, as hereinafter pointed out. Over this class of cases, however, Justice Storey states (p. 442) that admiralty did not claim jurisdiction *as of right*, and it is also said that admiralty would have no jurisdiction over a loan made by a captain to his passenger on his private account, or over a contract of marriage made on shipboard (2 Browne Ad.; 1 Amer. Ed., p. 94-95); that is to say, admiralty never claimed as of right jurisdiction over contracts which were not in their nature maritime, and admiralty never raised complaint against the common law when it took jurisdiction over such contracts by the fiction aforesaid, and there is no reason to suppose that the same position would not have been taken as to torts not in their nature maritime, although admiralty at one time had jurisdiction over such torts as of necessity. Nor is it necessary here to show that admiralty would have refused jurisdiction in a case of a tort not of a maritime nature, for the Courts in those early days were fighting from the standpoint of fees and perquisites, and we, therefore, find that notwithstanding the fact that admiralty did not claim as of right the jurisdiction over non-maritime foreign contracts under the Statute of Edward I at Hastings, yet we find the admiralty contending for such jurisdiction as late as 1575 and 1632, as is shown by the agreements of those years between the admiralty and common law (Benedict's Admiralty 4th Ed., p. 39, 46), and so likewise, admiralty may have contended for jurisdiction over a non maritime tort. But by Section 4 of the agreement of 1632 between the admiralty and the common law (Benedict's Admiralty p. 47) it was provided "likewise the admiral may require of and redress all annoyances and obstructions in all navigable rivers beneath the first bridges that are any impediments to navigation or passage to and from the sea, and also try personal contracts

and injuries done there, which concern navigation upon the sea and no prohibition is to be granted in such cases."

So that here at least there is some evidence that admiralty, notwithstanding the fact that it, at one time, from necessity, had jurisdiction over torts not of a maritime nature, and ceased claiming such jurisdiction, and had limited its jurisdiction to torts of a maritime nature. And Judge Winchester of the Maryland district in 1801 said that neither the judiciary act nor the Constitution limit the admiralty jurisdiction as to place, and that it is bounded only by the nature of the cause.

Stevens vs. The Sandwich, 1 Pet. Ad. Dec. 233.

Nor could there be any contention today that the District Court has jurisdiction over a non maritime contract made beyond the seas or within the flood mark merely because the admiralty once had jurisdiction of necessity over such, for the Constitution limits the jurisdiction to such causes as are maritime, and for the same reason the District Court would not have jurisdiction over a tort not of a maritime nature.

We, therefore, submit that the jurisdiction, as of right, of the admiralty was limited to causes of a maritime nature and that it was only this jurisdiction which was granted to the Federal Courts.

It has been assumed by many judges that the decision of Justice Story in De Lovio vs. Boit takes a position contrary to what we are here contending for, and we will, therefore, discuss that opinion.

Evidently after the establishment of the fiction above referred to as to torts, the Common Law overstepped its rightful jurisdiction by taking jurisdiction of maritime cases by the use of the fiction, for we find as early as Edward I the Common Law taking jurisdiction of a case for the seizure of a ship on the high seas, and laying down the rule that it

had power to take cognizance of a thing done as well upon the seas as upon the land (DeLovio vs. Boit, 414-417), and that in the time of Edward III it took jurisdiction of an action against the master for embezzlement by the mariner (Malloy de Jure Book II, Ch. III, Section XVI). At the same time, however, the skirts of the admiralty were not clear in this regard, for it likewise in turn "encroached upon other jurisdictions and usurped that which did not belong to it" (Benedict, s. 58).

In consequence of this encroachment, two statutes were passed in the reign of Richard II, under the construction of which a contest between the Admiralty and the Common Law arose, which lasted for two centuries, and only ended when the jurisdiction of admiralty was confined to contracts of a maritime nature, made upon the sea, and to be there performed, and to contracts which the Common Law admitted could be best enforced in admiralty, such as marine hypothecations and those for seaman's wages (DeLovio vs. Boit, 452-463). In seizing the jurisdiction of the Admiralty the Common Law Courts applied the fiction referred to, and while the contest has generally been ascribed to the jealousy of Coke, this jealousy was only the jealousy of the English people, who thought, whether rightfully or wrongfully, that complete justice could only be gotten before a jury of twelve men.

We will now take up these statutes of Richard II and endeavor to show that under their construction the question of locality was asserted by the Common Law as the test of its jurisdiction, irrespective of the nature of the cause, and that all Justice Storey is contending for in DeLovio vs. Boit is, that the nature of the cause is the sole test.

It was provided (13 Rich. II, Chapter 5):

> "That the admirals and their deputies shall not meddle henceforth of anything done within the realm, but only of a thing done upon the sea, according as it

> hath been duly used in the time of the noble King Edward III, Grandfather of our Lord and the King that now is."

And it was further provided (15 Rich. II, Chapter 3):

> "That of all manner of contracts, pleas and quereles and of all other things done or arising within the bodies of counties as well by land as by water, and also of wreck of the sea, the admiral's Court shall have no manner of cognizance, power nor jurisdiction, etc."

The first of these Statutes gives admiralty jurisdiction of things *done upon the sea* as distinguished from things done within the realm, and the second, takes from it jurisdiction of things *done or arising within the bodies of counties* as well by land as by water.

It was contended by the admiralty that these statutes were not intended to limit its rightful jurisdiction, but to restrain a wrongful jurisdiction.

It was contended by the law (and this contention was enforced), that it was not the ebb and flow of the tide which determined jurisdiction but the high seas; that admiralty had no jurisdiction over a tort committed within the body of a county, although committed within the ebb and flow of the tide; that it had no jurisdiction over a contract unless it was made and to be executed upon the high seas.

Thus we see that the contention was not as to whether admiralty had jurisdiction over *all torts* committed *on the water* but whether it had jurisdiction over *torts* committed on *one part of the water* as distinguished *from another*.

Justice Storey had before him the question as to whether admiralty had jurisdiction of a contract of marine insurance under the constitution granting to the Federal Courts cognizance "of all cases of admiralty and maritime jurisdiction." He went into the history of the admiralty jurisdiction from

the earliest times. He had before him the question as to whether the grant should include the original jurisdiction of admiralty, or whether the jurisdiction was to be limited to "things done upon the sea," as those terms had been construed under the Statutes of Richard, the question as to whether that jurisdiction was to be limited to contracts made upon the sea, as distingnished from those made upon the land, but to be performed upon the sea. He took up, however the jurisdiction over torts. The question here that he was discussing was not whether it had jurisdiction over all torts committed on the water, but whether it had jurisdiction over torts committed within the body of a county and at the same time within the ebb and flow of the tide, as distinguished from torts committed on the high seas. He says (p. 465):

> "Considerations and consequences like those which have been mentioned cannot but forcibly impress every one who has examined this subject with accuracy and diligence, and lead to the conclusion (adopted by Dr. Browne) that the jurisdiction of the admiralty depends, or ought to depend, as to contracts upon the subject-matter; *i. e.*, whether marine or not, and as to torts upon locality, *i. e.*, whether done upon the high sea or in ports within the ebb and flow of the tide or not."

Again he says (p. 474):

> "On the whole I am without the slightest hesitation ready to pronounce that the delegation of cognizance of "all civil cases of admiralty and maritime jurisdiction" to the Courts of the United States, comprehends all maritime contracts, torts, and injuries. The latter branch is *necessarily* bounded by locality; the former extends over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation business or commerce of the sea."

What the learned judge, therefore, held was that admiralty had jurisdiction over maritime contracts and over maritime torts; that the former was not determined by locality, because a maritime contract could be executed either on the land or the sea; that the latter was determined by locality because no tort could be maritime unless done on the sea within the ebb and flow of the tide.

The fact that the nature of the cause, whether contract or tort, is the true test has been lost sight of in many decision, because of the contest which was waged for so many years on the question of locality. There was never any contest waged as to the nature of a tort, because admiralty never claimed to have jurisdiction over a tort committed on land. The contest here was whether admiralty had jurisdiction over torts when committed on navigable waters, or only when committed on a part of these waters. Justice Story held that locality (navigable waters) was the test. As to contracts, admiralty claimed jurisdiction when it was of a maritime nature, whether made on land or within the ebb and flow of the tide, and the question here was whether the jurisdiction was not limited to contracts of a maritime nature made and to be performed on the high seas.

That this is the construction which has been put upon Justice Story's opinion and those which have followed it by this Court is shown by two cases in this Court.

We refer to

The Blackheath, 195 U. S. 361;
Martin vs. West, 222 U. S. 191.

In each of these cases a structure built up from the bottom in navigable waters was injured by reason of a ship colliding with it. Such a structure is a part of the realty.

The Court says with reference to such a tort, that it was begun and consummated upon navigable waters (195 U. S. 367).

If locality, therefore, is the sole test of jurisdiction and the nature of the tort is not to be taken into consideration, admiralty would have jurisdiction in the case of such a collision.

It will be found, however, that the question of jurisdiction turns on the nature of the damaged structure. If that structure is a beacon, then the tort is of a maritime nature and admiralty has jurisdiction. But if the structure is the pier of a bridge, then the tort is not of a maritime nature and admiralty has not jurisdiction.

In Martin vs. West this Court has said that the question as to whether or not a tort is of a maritime nature must be resolved according to the locality and the nature of the injured thing; and the English Court has said that in determining whether a tort is maritime or not we must consider three things: Locality, subject-matter of complaint, and person with regard to whom complaint is made.

The Queen vs. The Judge of the City of London,
1 Q. B. (1892) 273.

So that given the locality on navigable waters the jurisdiction of admiralty does not necessarily attach unless the tort is of a maritime nature.

It is therefore, submitted that locality is not the sole test of jurisdiction, and that the tort in question in this case, although committed on a ship lying in navigable waters, is not of admiralty cognizance, unless it be of a maritime nature.

B.

Is the tort of a maritime nature?

The jurisdiction of the admiral was exercised through the prerogative of the King just as was the jurisdiction of the Courts of Common Law. The law or custom enforced by the admiral, however, did not originate and expand within the confines of a particular country, but originated from the

necessities of shipping and expanded among the maritime states and nations. Its beginning must have been nearly coincident with the beginning of commerce on water, and it is to a great extent international. The Black Book is a collection of these laws and customs. We believe that we have noted in this brief all the torts which are mentioned therein as within the jurisdiction of admiralty.

They are as follows:

(1) Negligent collision between ships. The ship is personified, at least under the modern cases, and it can injure and is responsible for the injury irrespective of whether or not it is being navigated by its owner. The modern cases refuse jurisdiction in the case of a collision of a ship with a bridge or wharf, although the latter is used for commerce on water (Cleveland T. & V. R. R. vs. Cleveland S. S. Co., 208 U. S. 316; Martin vs. West, 222 U. S. 191).

(2) Collision with an anchor of another ship. This is nothing but the modern doctrine of jurisdiction in cases of obstruction to navigation. Admiralty has always had within its jurisdiction the regulation of navigation. It looks after both obstructions to navigation and aids to navigation. It enforces a claim for damages whether arising from a submerged pile (Phila., W. & B. R. R. vs Philadelphia, etc., Co., 23 How. 209) or from an unlawful structure in the water (Atlee vs. Packett Co., 21 Wall. 389). It likewise enforces a claim for damages to an aid to navigation done by a ship (The Blackheath) and would probably enforce such a claim when the damage is done by an individual.

(3) Damage to a ship by the negligence of its pilot. The English Court has refused to extend this jurisdiction to a claim for damages to one ship by the negligence of the pilot of another (Queen vs. Judge of the City of London).

(4) Injury to a ship by reason of some one removing the anchor or cutting the cable.

(5) Injury to a mariner in the service of the ship.

In such case the ship was liable whether negligent or otherwise only for the maintenance and care of the mariner. This is the rule today, except where the injury happens by reason of the unseaworthiness of the ship or of a failure to supply and keep in order the proper appliances appurtenant to the ship (The Osceola, 189 U. S. 158), in which event the mariner is entitled to damages. The modern cases have brought within this jurisdiction an injury to a person lawfully on board a ship caused by the negligence of the ship (Leathers vs. Blessing, 106 U. S. 626), and to a stevedore injured by the negligence of the ship (The Max Morris, 137 U. S. 1). But the modern cases have refused jurisdiction when the negligence of the ship operates injuriously to a structure on land (The Plymouth, 3 Wall. 20).

In all of these torts cited from the Black Book as within the jurisdiction of admiralty, there is present either an injury to a ship caused by the negligence of a ship or the negligence of a person, or an injury to a person caused by the negligence of a ship, and the modern cases have not extended this jurisdiction, but on the contrary have refused to extend the jurisdiction to the negligence of a ship operating harmfully to a structure on land whether by collision or otherwise. Therefore, a tort of a maritime nature is a tort arising out of an injury to a ship caused by the negligence of a ship, or a person or out of an injury to a person by the negligence of a ship. Therefore, there must either be an injury to a ship or an injury by the negligence of the ship, including therein, of course, the negligence of her owners or mariners.

There was no negligence of the ship in the present case. The tort is, therefore, not of a maritime nature.

The lower Court felt that the adoption of the doctrine of the nature of a tort as fixing the jurisdiction as distinguished from the doctrine of locality would produce serious difficul-

ties. We feel to the contrary. The doctrine of locality has produced endless difficulties, as witness the discussion of the two ladder cases: The Strabo, 90 Fed. 110, and the H. S. Pickands, 42 Fed. 239, and the discussion as to whether if a sailor falls from the yard arm by the negligence of the ship the jurisdiction would depend on whether he fell into the water and was drowned, or fell on the wharf and was killed. Indeed, Justice Brown has pointed out the difficulties of the locality doctrine in an article in 9 Columbia Law, Rev. 1.

The Court below was of opinion because admiralty had jurisdiction over crimes committed on navigable waters, it should also have jurisdiction over torts there committed. The jurisdiction over crime is, however, one of necessity.

No Grand Jury at Common Law could indict for murder done outside the body of a county, and no Court could punish for such a crime other than a Court of Admiralty. It was for this reason alone that the ancient maritime customs committed such crimes to the admiral.

As a result of the Hackfeld case and this case three articles have been written which may aid this Court in the determination of the question of jurisdiction. We refer to—

16 Harvard Law Rev. 210.
18 Harvard Law Rev. 299.
25 Harvard Law Rev. 381.

Point II.

The Master Did Not Fail to Furnish a Safe Place. The Place Was Made Unsafe by the Method of Operation, and Did Not Arise from the Construction of the Place.

The question which we are now about to discuss is raised by our Assignments of Error Nos. 3, 11, 13, 15, 16 and 17 (Imbrovek Record, pp. 99-100). The contention of the libellant is, that it is the duty of the maser to exercise reasonable

care to furnish a reasonably safe place in which the servant is to work, and that this duty is non-delegable. With this we agree.

R. R. vs. Baugh, 149 U. S. 368, 386.

He further contends, however, that the fact that the pins were not in place, and that the accident could not have happened if they had been, is sufficient evidence of the non-performance of this duty. We submit that it is not. Our contention is, that the evidence fails to show that the master did not perform its duty in furnishing a safe place; that the sole effect of the evidence is to show that a place which we are warranted in assuming safe, was made unsafe by the servants who was permitted to do the work in his own way and who selected an unsafe method, notwithstanding the fact that the master had placed at his disposal every appliance which, if used, would have made the method safe. That the lack of safety was not in the place except in so far as the place was made unsafe by the method employed in doing the work. That for this lack of safety the master is not responsible. That the "safe place" doctrine only applies to construction and not to the method of operation.

In discussing this question, we assume that one of the recognized uses of the pins was to prevent accidents such as that which happened. (See error No. 2.)

Let us go back to the time the ship arrived in Baltimore. This was at least two days before the accident happened. It was then the master took possession of the ship, and the various gangs were placed on board. Just exactly what was the condition of the ship as to the pins and the hatch covers at that time there is no evdence to show. The ship was prepared for unloading, however, and it appears that the unloading at the hatch in question was done through the centre section on Saturday and Monday. Whether the pins were in or out at this time we do not know, and as far as the evi-

dence shows it might have been perfectly safe at this time to unload without the pins and with the hatch partly covered, because the net may not have been in use. Whether this be so or not, inasmuch as there is no complaint as to the construction of the ship, or as to the sufficiency of her booms, tackle and other apparel, we can assume that it and they were in good condition. She was, therefore, upon her arrival, a safe place in which to work. If thereafter she became unsafe, it must have occurred from something that the servants did or omitted to do. It must have occurred from the method employed by them.

Let us now come to Monday at 6 P. M. It was then that the gang to which the libellant belonged came on board, relieving the day gang. They were expected to load the ship with copper. They found the hatch covers on except those over the centre openings. Whether they found the pins in or out we do not know. If they found the pins in, the gang boss must have ordered them out, and if they found them out, the gang boss must have decided that he desired to work with them out, but they were there for use if desired. He must also have decided to work with the hatch partly covered, so that it is perfectly plain that the place where the libellant worked as far as danger is concerned was made dangerous by the failure of the boss to do or not to do something. In other words, the accident happened not by reason of any inherent danger in the place arising from a faulty construction of the ship, but because of the method pursued by the servant, the servant selected an unsafe method when the master had furnished him with all the appliances to make it safe. Under such circumstances the negligence was the negligence of the boss, and as the boss and the libellant were co-servants, the master is not liable.

If the lower Court is right, then the master cannot delegate to a boss the method of unloading, but he (the master) must be ever present to say whether a particular method em-

ployed at a particular time is proper. We submit that this is not the correct rule. We submit the following authorities as bearing us out in these contentions :

2 *Bailey Personal Injuries*, Sec. 2885 and 2993 ;
Kelly vs. Norcross, 121 Mass. 508 ;
Martin vs. R. R., 166 U. S. 399 ;
Brown vs. People's Gas Light Co., 81 Vt. 477;
Kelly vs. New Haven Steamboat Co., 74 Conn. 343 ;
Tilly vs. Rockingham, etc., & Co., 74 N. H. 316 ;
Hussey vs. Coger, 112 N. Y. 614 ;
Hogan vs. Henderson, 125 N. Y. 774 ;
The Queen, 40 Fed. 694 ;
Cleveland vs. Railroad Co., 73 Fed. 970 ;
The Picqua, 97 Fed. 649 ;
Kelly vs. Jutte & Foley Co., 104 Fed. 955 ;
McDonnell vs. Oceanic Steam Nav. Co., 143 Fed. 480 ;
American Bridge Co. vs. Seals, 144 Fed. 605 ;
Westinghouse vs. Callaghan, 155 Fed. 397.

In 2 Bailey on Personal Injuries, the rule is stated as follows :

Sec. 2885 : "It is the duty of the master to provide and maintain for his servants a reasonably safe place for the doing of their work.

Sec. 2993 : This rule has no application to premises made unsafe by the negligent manner in which the fellow-servants are performing their work."

In 81 Vt. 477, the plaintiff was injured because the trench in which he was digging was not shored, although timbers were provided by the master for that purpose.

It will, therefore, appear that the place in which the workman was injured was rendered unsafe by reason of the way in which the work was done, notwithstanding the fact that the master had furnished materials to render it safe.

The Court says, page 480:

> "Among the non-delegable duties which a master owes his servant is that of providing and maintaining a reasonably safe place in which to work. But this rule does not require the master to supervise the merely executive details of the work as it goes along. These are acts of service and are within the proper range of the servant's duties. They may be delegated to a competent co-servant, and when so delegated, negligence therein, though resulting in injury, will not support an action against the master. And it matters not whether the offending servant be a foreman, overseer, superintendent, or a mere fellow workman; the result is precisely the same—the master is not legally responsible—for it is the character of the act in question which determines. So it is that when a master provides his servant with suitable materials and instrumentalities to make safe the place, and a competent foreman to use and apply them, he fully discharges his legal duty, and the negligence of the foreman in the manner in which the appliances are used, or in failing to make use of them at all, will not establish liability on the part of the master."

The Court again says on page 484:

> "Some time the same result is reached in such cases by saying that the safe-place rule does not apply where the prosecution of the work itself makes the place and creates its dangers. But it seems to us more logical to put the case upon the broad ground that the master has fully complied with the safe-place rule when he has provided against such dangers as may reasonably be apprehended by furnishing the servant with the means of protecting himself."

In 74 Conn. 343, an accident arose by reason of the failure to use a fender (which had been provided by the master)

while docking a vessel. The mate's duty was to employ the deck hands and to determine whether it was necessary to use the fender. The plaintiff was a deck hand and it was their duty under the orders of the mate to assist in docking.

It was contended that the master had not furnished a safe place. On page 347, the Court says:

> "It (the defendant) had furnished a sufficient fender and a place in which it could be used, and it kept the fender in a proper and convenient place at all times ready for use. In doing this it had performed its full duty in this respect. It was not obliged to be there every time the boat was docked to use the fender, or to see to it that it was used. It was the duty of the defendant to furnish the appliances; it was the duty of the servants to use them when necessary. When the owner of a vessel furnishes proper guard rails, gang planks and hatch covers for the use of the crew, we know of no case that has gone so far as to hold that he is liable to one of the crew for the negligence of a fellow servant. In leaving the guard rail down, the hatchway uncovered or the gang plank insecurely fastened, such negligence are incidental to the use by the crew of the appliances furnished by the master, and the only way the master is required to guard against them is to appoint a sufficient number of competent servants. Our conclusion is that the Court below erred in holding that the defendant was liable for the negligence of the mate upon the facts in this case."

In 74 N. H. 316, the plaintiff was engaged in cleaning out a gas main under the direction of a foreman who had charge of the defendant's gas department. The main was provided with valves, which, if closed, would cut off the flow of gas through the main. It was contended that through the neglect of the foreman to close these valves an explosion occurred which injured the plaintiff.

The Court says, page 318:

"But the plaintiff says in argument that the failure to close the valves and the consequent flow of gas in the pipes rendered the place to which he was assigned an unsafe place for his work. The place was a portion of a structure designed for the manufacture of gas. So far as appears it was reasonably safe for that purpose. As previously stated, valves were provided for shutting the gas from the pipes whenever there was occasion for so doing. It does not appear that any special construction was required for airing the pipes. According to the plaintiff's allegations whatever want of safety there was in the place at the time of his injury was temporary, and was due to the failure to make proper use of the valves, or to properly air the pipes, or both. The defendants having provided proper appliances for securing safety to their employees were not chargeable with the non-delegable duty of properly operating them. They were at liberty to trust the operation of the appliances to any of their employees, provided only they exercised ordinary care in selecting the employees, and it is not contended that they failed in this respect in this instance. At best, so far as appears by the testimony, the acts required to secure safety of place were mere acts of service which the defendants might properly delegate to their employees."

In 112 N. Y. 614, the injured servant was working in the hold of the vessel, and was injured by the hatch covers falling on him, the facts being that the defendant exercised no personal supervision over the work, but devolved its whole management and control upon the superintendent, who was authorized to employ and discharge and to regulate and direct the manner of the work. The superintendent called to two men to lift the covers, and one lifted before the other

had hold. The consequence was that the hatch covers slipped and were precipitated on the men below.

The Court held the master not liable, saying (page 619):

> "This vessel was constructed in the usual and ordinary mode of such steamers, and there was nothing about the arrangement of the hatchways, their appliances or the various decks of the vessel which presented any danger if used in their usual and customary manner, to those employed about them."

And the Court says, on page 621:

> "It would be extending the liability of a master beyond any established rule to require him to oversee and supervise the executive detail of mechanical work carried on under his employment, and there is no rule of law which authorizes it."

In 125 N. Y., page 774, the stevedores had built a platform for the purpose of loading a vessel. It was negligently constructed, although the master had furnished proper material, which, if properly used, the accident could not have happened. The plaintiff was not allowed to recover.

The Court says:

> "But the place which the master furnished was the ship itself, constructed in the usual way, and which became unsafe not by reason of any carelessness or negligent plan or manner of construction, as to which no contention is made, but solely for the way in which the longshoremen did their work."

In 104 Fed. 955, the accident happened because a derrick had not been properly bolted.

In deciding for the defendant, the argument being made that the master had not furnished a safe place, Judge Dallas says (page 957):

> "The sole complaint is that it was not properly bolted, but it certainly was intended that it should be, and the

bolts as well as the necessary mechanics and tools had been actually and adequately supplied."

In 144 Fed. 605, a bridge was being built by the use of false work, and there were large openings, the master had furnished sufficient lumber with which the openings could have been covered, if the workmen had seen fit to do so, and had also furnished a snub-rope to prevent a load, being drawn up on a pulley, from swinging, but the workmen omitted to use the snub-rope or cover the openings, in consequence of which, a load which was being drawn up, struck one of the workmen and knocked him through one of the open spaces. By reason of these omissions it was contended that the master had failed to provide a safe place.

It was held by Judge Sanborn that the master was not liable.

The Court says (on page 611):

"It is the duty of the master to use ordinary care to furnish reasonably safe machinery and instrumentalities with which his servants may perform their work, and a reasonably safe place in which they may render their services, and this duty may not be so delegated by him that he may escape liability for its breach. Nevertheless, this duty has its rational and legal limits. It does not extend to the guarding of the safety of a place or of a machine against its negligent use by the servants. The risk that a safe place will become unsafe, or that safe machinery will become dangerous, by the negligence of the servants who use them, is one of the ordinary risks of the employment which the servants necessarily assume when they accept it. *It is a risk of operation and not of construction or provision; and the duty to protect place and machinery from dangers arising from negligence in their use is a duty of the servants who use them, and not that of the master who furnishes them.*"

In 97 Fed. 649, the accident happened in a similar manner to the one in question, and the Court there held that it was due to the negligence of a co-servant.

So much the more will the doctrine enunciated in the above authorities appear applicable to the facts of this case, when it is remembered that there is no proof that the pins were intended to be used while the ship was being unloaded, nor to prove that Imbrovek and Szczesek, who were leaders (R., p. 40), that is, sort of sub-foremen (R., p. 65), did not know that the pins were out, and when it may be, from all the testimony shows, that Imbrovek and Szczesek removed, or helped to remove, the pins in question at the time the ship arrived in port.

The learned Court below says in his opinion (R., p. 95) that it is not important to determine whether Lenk, the gang boss, was a vice-principal or not, but he added that it seemed probable that he was.

We have assumed that the Court decided that he was, and have, therefore, assigned it as error. (See error No. 5.) It seemed to the Court probable for three alleged reasons: Because he had complete control of the work; because he had the power to employ and discharge the men under him, and because of the lack of supervision over him.

Now, it is most respectfully submitted that the learned Court erred in this, for in the first place, the evidence does not show that Lenk had any more control than any other boss whose duty it is to supervise a gang of workmen, and such control has never been held, to our knowledge, by the Supreme Court sufficient to make the boss a vice-principal. In the second place, Lenk did not have the power to discharge men (R., p. 64), or, rather, if he did, there is no evidence to show it, but if he could both employ and discharge, this was not sufficient to make him a vice-principal. In the third place, there is no evidence to show that there was any lack of supervision over Lenk (see error No. 6). We do not

know who was Lenk's immediate superior. Nor do we know what instructions, if any, had been given Lenk (see error No. 5). We, therefore, submit that Lenk was a co-servant of each member of his gang.

The learned Court below in his opinion (R., p. 96), says:

> "The stevedore's sole witness, Bartholl, appears to have had entire charge of the work of loading and unloading. He at least appears to have occupied the position of vice-principal. The testimony at all events does not show what other human being acted for the corporate respondent."

We can not agree that Bartholl was a vice-principal (see error No. 7). The testimony shows that Bartholl was head foreman (R., p. 55). There is no testimony to show what his duties were, except what may be gathered from his statement, that he had a gang at work in the particular hatch on Monday (R., p. 60). Whether he meant by this that he had assigned a gang for that particular hatch, or whether he meant that he was foreman over a gang that was working there, we do not know. He further stated that when the ship first came in, he assigned to the various hatches various gangs of stevedores (R., p. 64). Whether he assigned Lenk or his gang to work on Monday night, we do not know. In all probability he did not, because his testimony is that he was not there (R., p. 59). So that the only evidence from which the Court could conclude that Bartholl was a vice-principal was from the mere statement that he had assigned the gangs when the ship first came in.

We submit that this was not sufficient evidence to warrant the Court in finding that Bartholl was a vice-principal (see error No. 7).

On this immediate question there are two important cases to be considered other than those already cited, many of which deal with the question as to whether the act of negli-

gence complained of was the act of a co-servant or of a vice-principal.

In *Alaska Mining Company vs. Whelan*, 168 U. S., p. 86, the facts were that the plaintiff was employed in the defendant's mine in breaking and preparing rocks for the chutes. He was ordered by the foreman of the defendant to break rock immediately above and over one of the chutes, and while so employed, the foreman drew, or caused to be drawn the gate at the mouth of the chute, over which the plaintiff was working, thereby causing the rock at the head of the chute to be drawn in, carrying the plaintiff with it in the chute.

Now, it will be perceived that the place where the plaintiff worked was a dangerous place only if operated in a dangerous manner, for the accident could not have happened had the plaintiff been notified before the door of the chute was opened. The Court held the master not liable, and in passing on the question as to whether or not the foreman is a co-servant of the plaintiff, said:

> "Finley (the foreman) was not a vice-principal or representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence *in using the machinery or in giving orders* to the men."

In the case of *B. & O. Railroad Company vs. Baugh*, 149 U. S., page 368, the Supreme Court of the United States had before it the question as to whether or not an engineer who had control over firemen was for that reason a vice-principal, and, therefore, the company liable for an injury to the fireman arising from the neglect of the engineer.

The Supreme Court had previously decided that the conductor of a train was a vice-principal, and the Court undertakes to distinguish between the two cases, and in doing so, it lays down the following rules (pages 383 to 387):

Prima facie all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants; that the master owes certain positive duties to the servant. These positive duties are to use reasonable care, to furnish a reasonably safe place, tools and machinery, and to furnish competent fellow servants; that if the master delegates these positive duties to an employee, that employee becomes a vice-principal. He stands in the place of the master, and the master is responsible for his negligence in performing these positive duties; that an employee in respect to other employees under him is a vice-principal, where the business of the master is separated into departments of service, and such employee is placed in charge of a separate department and given *entire and absolute* control over the same; that the question of liability turns rather on the character of the act than on the relations of the employees to each other; that if the act is one done in the discharge of the positive duties of the master to the servant then negligence in the act is negligence to the master, but that if the act be not one done in the discharge of such positive duties, then there should be some personal wrong upon the part of the master before he is held liable therefor.

Under the doctrine announced in these two cases, it is submitted that neither Lenk, the gang boss, nor Bartholl, the head foreman, were vice-principals, but that each of them was a co-servant with each member of the gang of stevedores, because neither had, so far as the evidence shows, entire and absolute control of any department of the master's business, and neither had been assigned by the master to perform one of its positive duties, and because even if Lenk had the right to employ and discharge, which the evidence does not show, that would not make him a vice-principal.

It is, therefore, respectfully submitted that the master did not fail in its duty to furnish a safe place.

Point III.

Was the Failure to Use the Pins the Proximate Cause of the Accident, and the Consequent Injury and Death?

Let us suppose that the master was bound to see that the pins were in place. Even if this be so, the accident could not have happened, according to the undisputed testimony, had the net man properly hooked the net on, or had he steadied it, so that it would not swing (R., p. 59 and 60) (see error No. 12). Bartholl testifies that the net had been in use for at least seventeen years (R., p. 79); that ships are loaded seven out of ten times in the same way; that during all this time he had never heard of an accident happening this way (R., p. 69). While it is true, that so far as the testimony shows, the pins may have been in place on all the prior occasions, when there were pins, still it must often have happened during all these years that many ships were unloaded in the same way in which no pins or pin holes were provided.

The burden was on the libellant to prove a state of facts which would naturally lead to the conclusion that the injury was the natural and probable consequence of the failure to

use the pins. The only evidence on this subject was the evidence of experience. This omission had never previously caused the beams and hatch covers to be pulled out of pace. This did not occur until the carelessness of a co-servant caused it.

Under such circumstances the negligence of the master in failing to use the pins was not the proximate cause of the injury.

Kelly vs. Jutte & Foley Co., 104 Fed. 955, 958;
American Bridge Co. vs. Seeds, 144 Fed. 605, 609-10.

Point IV.

Was There Sufficient Evidence to Show That the Master Failed to Use Reasonable Care to Furnish a Reasonably Safe Place?

We assumed in discussing Point 2, that the lower Court was right in finding or holding that there was evidence to show that one of the recognized uses of the pins was to prevent an accident of the kind in question.

In discussing the question under the present point, we take the position that there was no such evidence (see error No. 2); that the sole evidence before the Court was the happening of the accident and the evidence to show that it could have been prevented by the use of the pins; that in order to show that the master had not performed its duty it was necessary to show that the pins were intended to be used to prevent an accident of the kind in question. There was no evidence to show what the pins were intended to be used for and on what occasions they were intended to be used, and we assume that their purpose was when screwed in tight to give the ship additional strength to stand the roughness of the seas. The evidence of Bartholl is the evidence of an experienced stevedore, to the effect that there was plenty of room to work with only the centre section open; that the work had

been done in the same way for many years and, necessarily, therefore, on many ships, and that no such accident to his knowledge had ever happened before, and that in his opinion no such accident could happen, barring the negligence of the employees.

The lower Court says that the evidence of Bartholl does not negative the assumption that, on all the occasions which he testifies to, in which there was no such accident, the pins may have been in place. But it certainly must have happened in the last seventeen years that Bartholl had seen unloaded and helped to unload many ships which were not provided with pins.

Now, in most cases after an accident happens it is very easy to see how it could have been prevented, and to say, as the lower Court does, that the possibility of the accident was obvious (see error No. 4), but because it could have been prevented, does not necessarily render the master responsible. His duty is to use reasonable care to furnish a reasonably safe place. He has never been held to guarantee the safety of the place. He is only bound to use reasonable precautions to procure such safety, that is, such precautions as a reasonably prudent man would use. As, therefore, in the opinion of a man experienced in the business which the master was carrying on, all reasonable precautions had been taken, and as there was no evidence to show that the pins were intended to be used while the ship was being loaded, we submit that there was no evidence from which the Court could conclude that the master had not performed its duty.

The Noranmore, 113 Fed. 367.

It is, therefore, respectfully submitted that the decree in each of the above two cases should be reversed.

NICHOLAS P. BOND,
RALPH ROBINSON,
EDWARD DUFFY,
Counsel for Petitioner.

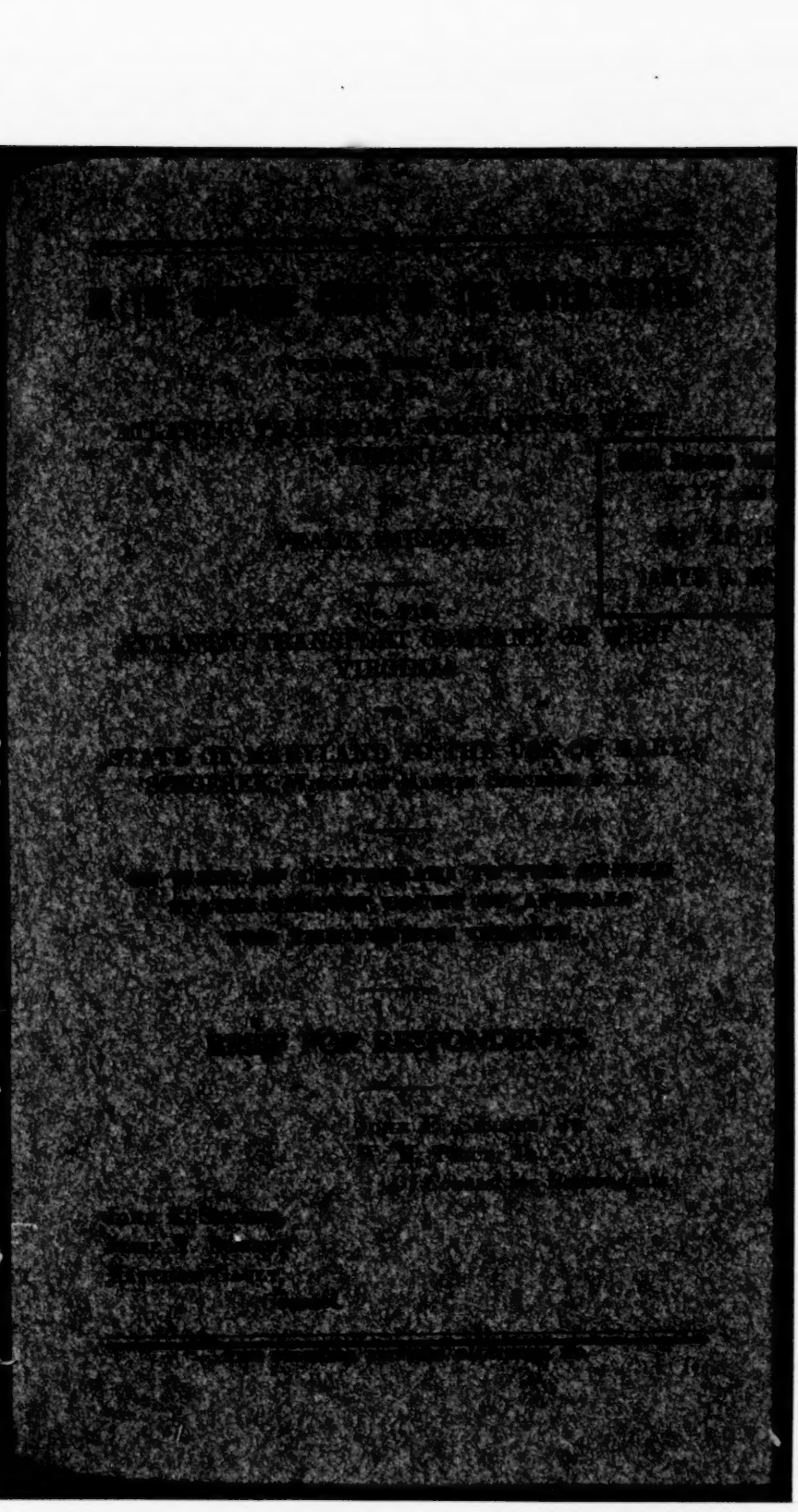

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TABLE OF CASES CITED.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 215.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA

vs.

FRANK IMBROVEK.

No. 216.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA

vs.

STATE OF MARYLAND TO THE USE OF MARY SCZCESEK, WIDOW OF MARTIN SCZCESEK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

INTRODUCTORY STATEMENT.

These cases come before this Honorable Court upon a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. The petition for the Writ of Certiorari was based upon the alleged diversity of decisions of two Circuit Courts of Appeal,

upon the question of admiralty jurisdiction. For this reason we respectfully submit that the assignment of error, raising the question of admiralty jurisdiction, will be the only one to be considered by this Honorable Court unless it can be shown that the concurring decisions of the two subordinate Courts, in passing upon the facts of this case, were clearly erroneous.

Statement of Facts.

We respectfully submit that the facts as stated in the Petitioner's Brief are misleading in that they omit certain important facts and evidence. We refer more particularly to the heading, "Lack of Evidence," in the Petitioner's Brief. In view of what has been stated in the Introductory Statement, we do not deem it necessary to impose upon this Honorable Court by controverting in detail the Petitioner's argument upon the evidence as is set forth in the Statement of Facts. We desire however, to call this Honorable Court's attention to the following facts:

(*A*) The libels in these cases were filed against the Hamburg-American Steam Packet Company, a foreign corporation, with a Writ of Foreign Attachment, and also against the Atlantic Transport Company of West Virginia, a corporation which was conducting a stevedoring business. The testimony introduced on behalf of the libellants showed negligence on the part of the Hamburg-American Steam Packet Company, as well as on the part of the American Transport Company. It was however, upon the testimony adduced by the Atlantic Transport Company that the Steam Packet Company was exonerated, and the libel dismissed as to the latter.

(*B*) That the evidence shows there were certain bolts or pins which fastened the iron cross bars to the hatch combings, and that when these bolts were in place, it was impossible for the hatch covers to pull up (Imbrovek Record, page 58).

When therefore, these bolts were in place, an accident such as the one at bar could not occur. It takes a man about five minutes to put these bolts in (Imbrovek Record, page 61). It is not however, the business of a stevedore to put the bolts in. He notifies an officer of the ship and he in turn directs the ship's carpenter to put the bolts in position (Imbrovek Record, page 62). Ordinarily, a stevedore takes the bolts out, although it is possible that the ship's crew may take them out. The only way that the bolts could be placed in position is through the direction to an officer of the ship.

In the case at bar, when the ship arrived in Baltimore, and the stevedore took possession of the ship, the evidence shows that it was *not known* whether there were any bolts in the hatch covers at that time or not. Edward Bartholl, the head foreman, of the Stevedore Company, and in fact, as far as the evidence shows, their sole representative, testifies on this point as follows (Imbrovek Record, page 77):

> "Question: As I understand it, you do not know whether these bolts were in place when the ship came in here or not. I think you said you did not make any inspection of them?
>
> Answer: No, sir, I did not.
>
> Question: Could the accident have happened if these bolts had been in?
>
> Answer: No, sir."

(*C*) That the accident occurred on a vessel while in *navigable waters,* to wit, alongside a pier in the harbor at Baltimore, Maryland.

We wish, in addition to this, to refer this Honorable Court to the full and impartial Statement of Facts in this case, in the opinion delivered by the District Court through Judge Rose, which is set out in full in the present Record. (Imbrovek Record, pages 85-86.)

Assignments of Error.

Of the seventeen Assignments of Error (Imbrovek Record, pages 99-101), the only two relied upon by the Petitioner are:

1—That a Court of Admiralty has no jurisdiction over a case brought by a stevedore against his master, a Stevedore Company, for an injury sustained while loading or unloading a vessel, when the said stevedore bears no contractural relation to the ship, its master, owner or agent.

2—(No. 13, as set forth in the Seventeen Assignments of Error). That there is no evidence to show that the accident and the consequent injury resulted from the negligence of the appellant, the Stevedore Company.

ARGUMENT.

Point 1.

A—As to Question of Admiralty Jurisdiction.

We respectfully contend that Admiralty has jurisdiction in the cases at bar for the following reasons:

First—*The question of whether or not a Court of Admiralty has jurisdiction over a case brought by a stevedore against a Stevedore Company* **alone**, *for an injury sustained aboard a ship, is not before this Honorable Court.*

Second—*Locality is the sole test of the jurisdiction of Admiralty over torts.*

Third—*The Constitutional extent of Admiralty jurisdiction is involved in the present case.*

Fourth—*The tort in this case was essentially* **maritime** *in its nature.*

Of these in their order:

FIRST.

Libels in these cases, as we have above stated, were filed against the master and owners of the ship as well as the petitioner, the Stevedore Company. The libellants charged that both the masters and owners of the ship and the Stevedore Company were negligent in failing to place the pins or bolts in the hatch combings. If this allegation was true, Admiralty clearly would have jurisdiction. No argument can be based on the fact that the ship and its owners were joined with the Petitioner merely for the purpose of obtaining jurisdiction. The proctors for the libellants not being able to determine from the statements of the witnesses who was responsible for the dangerous condition that caused the accident, joined all. Upon the evidence produced on behalf of the *Atlantic Transport Company* the District Court concluded that the ship and its owners were not responsible, and accordingly, dismissed the libel as to them. Although the Court in this manner decided that the Stevedore Company was legally responsible for the serious injuries to the libellants, the Stevedore Company is now endeavoring to deprive the libellants of any compensation for the injury, after responsibility has been fastened upon it, upon the merits of the case, by two tribunals, though the technical claim that the District Court had no jurisdiction in rendering a decree against it, because the evidence showed that the ship or its owners were not *jointly* responsible with the Stevedore Company for the accident.

If the decision of the District Court had been otherwise, and the decree had been against the owners of the ship as well as the Stevedore Company, does the Petitioner contend that the decree as to the Stevedore Company would have been an invalid one? Or, again, if the decree had been against the ship's owner alone, would the libellants be entitled to begin suit anew in a State Court against the Stevedore Company?

We earnestly contend that the allegations of the libel, that is, the statement of the case, confers jurisdiction in the absence of evidence that such allegations are fraudulently made solely for the purpose of obtaining jurisdiction.

In support of this we wish to refer this Honorable Court to the decisions to the effect that:

(1) Where there is an allegation that the jurisdictional amount is involved, and it subsequently develops by the evidence that the jurisdictional amount was not involved, the Court has authority to enter judgment for a less amount, unless the allegations were fraudulently made for obtaining jurisdiction.

Smith vs. Greenhow, 109 U. S. 669;
Barry vs. Edmonds, 116 U. S. 650;
Schunk vs. Moline M. & S. Co., 147 U. S. 500;
Smithers vs. Smith, 204 U. S. 632.

This latter case is the last authority which has been found upon this point. In this case there was a suit for the recovery of land of the alleged value of $5,000, and for $2,000 damages for its detention. Upon hearing the evidence the Circuit Court stated that the defendants did not act jointly as the Plaintiff had alleged, and that the land taken and held by the Defendants was of much less value than $2,000. The Court, then, acting upon the authority of the Act of March 3, 1875, and Amended Act of August 13, 1888, dismissed the action on the ground that the jurisdictional amount was not involved. The United States Supreme Court, reversing and remanding the case to a lower Court, stated in its opinion (through Justice Moody, 640):

> "The rule that the plaintiff's allegations of value govern in determining the jurisdiction, except where upon the face of its own pleading it is not legally possible for him to recover the jurisdictional amount, controls, even when the declaration shows that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount."

(2) Where the requisite diversity of citizenship exists at the commencement of a suit, no subsequent change in the situation of the parties ousts the jurisdiction of the Court.

Morgan's heirs vs. Morgan, 15 U. S. 290 (2 Wheat.);

Clarks vs. Mathewson, 37 U. S. 164 (12 Pet.).

In the case of Mollan vs. Torrance, 22 U. S. 537, which was a suit on a promissory note, where a plea was entered that the parties were both citizens of the same State, and a demurrer to the plea on the ground that the plea did not aver that they were citizens of the same State at the time the action was brought, the Court, in sustaining the demurrer, speaking through Chief Justice Marshall, states:

> "It is quite clear that the jurisdiction of the Court depends upon the state of things at the time the action was brought, and that after vesting, it cannot be ousted by subsequent events."

(3) Where federal and non-federal questions are involved, in the same suit, and jurisdiction has properly attached for the purpose of determining the federal question, the Federal Court has a right, and in fact, it is its duty to finally determine all matters in dispute.

Judge Brewer in Omaha Horse R. R. Co. vs. Cable Tramway, 32 Fed. Rep. 727, says on page 729, in delivering the opinion of the Court:

> "It is the settled law of the Supreme Court, that when a case is presented involving a federal question, the jurisdiction of the Court attaches to the whole case, and is not limited to the mere decision of that single federal question."

Tennessee vs. Davis, 100 U. S. 257, 270;
R. R. Co. vs. Miss., 102 U. S. 135, 141;
Chappell vs. U. S., 160 U. S. 499;
Williamson vs. U. S., 207 U. S. 425.

The latest case that we have been able to find in this Court is the case of Siler vs. L. & N. R. R. Co., 213 U. S. 175. This is a case in which the questions involved were the constitutionality of a certain State statute under the Federal Constitution (a non-federal question), and the validity of an order of the State R. R. Commission, the Court decided in this case that where jurisdiction had once been obtained because a federal question was involved, it was proper for the Court to decide the local question only and omit to decide the federal question.

If the law were otherwise than above stated, and the outcome of a suit could be looked to as fixing the jurisdiction of the Court, then it would follow that in every Admiralty case where the Court decreed in favor of the ship or its owner or master, it would by virtue of that decree, be deprived not only of jurisdiction to render any decree against the co-respondent, or as in the case at bar the Stevedore Company, but also in favor of the ship or its owner or master.

The salutary effect of such a principle of law can be easily discerned, for otherwise, not only would great inconvenience result, but also injustice. In the case at bar the libellants suing *in forma pauperis,* come into the Court of Admiralty, which has jurisdiction of the ship's owners and masters, and agents, and join the Stevedore Company. After trial, they are informed that the ship's owners and master are not liable, that they have misjoined the Stevedore Company with the ship's owners and masters, because the Admiralty Court has no jurisdiction over the former, and they are therefore compelled to bring their suit *de novo.*

(4) Hackfeld case distinguished.

In the case of Campbell vs. Hackfeld & Co., 125 Fed. 696, which was a libel for injuries by a stevedore against a Stevedore Company, where the injury was sustained aboard the ship, the Court held that it was not properly brought in Ad-

miralty, but clearly distinguished between the case where the ship and its owners have been joined, by using this language, on page 697:

> "Not only does the libel fail to allege anything against the ship, its owner, officers or crew, but it affirmatively alleges 'that the persons who were engaged in the unloading of said bark *Aeolus* were all employees of said defendant, and not members of the crew, or employees of said bark *Aeolus*, and not fellow servants in any capacity with any of the employees of said bark *Aeolus*.'"

In other words the Court expressly held that in that case the allegations of the libel had not only failed to join the ship or its officers or crew in any manner, but had distinctly alleged that the former were in no way liable for the injury. Unless therefore this Honorable Court believes that the only object of joining the ship's owner and master in the libel at bar was to obtain jurisdiction in admiralty, we most respectfully urge, that having decided this question against the libellant, with regard to the ship's master, it is not only proper, but the duty of the Admiralty Court to determine the question as against the Atlantic Transport Company or stevedore company. In the case of the *Clan Graham* (decided since the Hackfeld case) reported in 153 Federal Reporter, 977, the Court held that under Admiralty Rule No. 46 it was permissible to join in tort for a personal injury a claim *in rem* against a vessel and one *in personam* against the stevedore company, although it can be shown that the latter are neither the master nor owner of the vessel, where the injury is alleged to have resulted from the joint negligence of both and the joinder will best serve the ends of justice. The Court in its opinion on page 979 says:

> "The libel as it affects either, arises from the same state of facts, and the relief obtainable is identical, except that the enforcement of the decree in one case will be against the ship, or the thing, while in the other it will be against the person, and execution will be satis-

fied generally out of the property of that defendant. I see, therefore, no reason why in permitting the joinder, justice would not be as well subserved in the one case as in the other. Such joinder is not prohibited by the rules; and parties guilty of a joint tort being liable jointly or severally, the practice would be no innovation of the general rule obtaining at law. By analogy, I am constrained to the opinion that both expediency and justice warrant its application in admiralty also."

The question of jurisdiction was not raised in this case, the right of recovery as against the stevedore being undisputed. Apparently the only point which the Court thought worthy of consideration in determining whether there had been a *misjoinder* was the question of joining an action *in rem* with an action *in personam.*

SECOND—LOCALITY IS THE SOLE TEST OF THE JURISDICTION OF ADMIRALTY OVER TORTS.

It is confidently asserted that in questions of tort, from the earliest decisions the sole test of Admiralty jurisdiction has been the *locality of the person or thing injured at the time of impact with the intentional or negligent force.*

No Supreme Court or Lower Federal Court case has ever limited this so-called "Locality Test," except the one case in the Circuit Court of Appeals for the Ninth Circuit (Hackfeld Case, 125 Fed. 696). In fact, the jurisdiction of Admiralty over torts has been gradually enlarged and extended by the recent decisions.

In questions of contracts, as distinguished from torts, Admiralty jurisdiction depends mainly upon the subject-matter—that is, the nature of the service and engagement—and is limited to such subjects as are purely maritime.

Ex-parte, Easton, 95 U. S. 72;
Insurance Co. vs. Dunham, 11 Wal. (78 U. S.), 1, 26.

1. Distinction Between Admiralty Jurisdiction of the United States and that of England.

The greater portion of the Petitioner's Brief is devoted to an interesting history of the English Statutes and the decisions of the English Courts in order to convince this Honorable Court that it is now time to abandon our whole course of decisions and return to the hopeless confusion resulting from the varying decisions of the English Common Law Judges, which, as was said by Justice Grier in the case of Moorewood vs. Enequist, 23 Howard, 493,

> "are founded on no uniform principle and exhibit illiberal jealousy and narrow prejudice."

By reason of the jealousy of the English Common Law Courts, against the Admiralty, the latter's jurisdiction is narrower and more restricted in England than in any other Country. In the United States the Admiralty jurisdiction of the courts is not confined or restricted by restraining statutes or the prejudiced interpretations of these statutes by the judiciary.

The learned and exhaustive opinion of Justice Bradley, in the case of Insurance Co. vs. Dunham, 11 Wall. 1, deciding that Admiralty has jurisdiction to entertain a libel *in personam* on a policy of marine insurance to recover a loss, remains today as one of the land marks on the question of Admiralty jurisdiction in contracts. The learned Judge reviewed in detail the reasons why the English statutes and decisions have little or no application to the Admiralty jurisdiction of the courts of the United States. On page 2 he uses this language:

> "But this narrow view has not prevailed here. This Court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be

interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England."

Mr. Justice Bradley, approximately four years later, in the case of "The Lottawana," 21 Wall. 558, 574, reiterates the futility of resorting to the English decisions in order to enlighten our courts in determining the question of Admiralty jurisdiction, but states rather that the decisions of this Court, giving the construction to the laws and the constitution, are especially to be considered.

Vide also—

N. J. Steam Navigation Co. vs. Merchants Bank, 47 U. S. 344, 385;
"The Blackheath," 195 U. S. 361.

2. Locality The Sole Test.

As has been stated, the sole test of jurisdiction of tort cases is locality for more than fifty years this Court having so decided in a multitude of cases, without dissent or question. The first important case in which the question of admiralty jurisdiction in torts was considered is the case of "The Plymouth" in 3 Wall. 36, which was a case involving damage by fire to packing houses upon the wharf, by flames from a tug. The Court decided that Admiralty did not have jurisdiction, because the damage occurred on land, but in reviewing the question of Admiralty jurisdiction in questions of tort, the Court, speaking through Justice Nelson, uses this language:

"*Every species of tort, however occurring, whether on board a vessel, or not, if upon the high seas or navigable waters is of admiralty cognizance.*" (Italics supplied.)

This case has been repeatedly cited and applied by this Court.

Judge Story, in Thomas vs. Lane, 2 Sumner, page 1—(page 9)—with regard to jurisdiction of Admiralty in torts:

> "I have always understood that the jurisdiction of admiralty is exclusively dependent upon the locality of the act."

Vide also—

Delovio vs. Boit, 2 Gallison, 398.

The trend of the decisions of this Court, we respectfully contend, has been to enlarge, rather than to narrow, the Admiralty jurisdiction in questions of tort.

In Leathers vs. Blessing, 105 U. S. 626, a case for damages, brought by a stranger against the master of a Steamboat Company for injuries resulting from the latter's negligence in failing to properly protect a person who desired to go aboard the vessel while at the wharf, the Court, upholding the right of Admiralty to assume jurisdiction in such cases, stated (on page 630):

> "Not only does the jurisdiction of Courts of Admiralty in matters of tort depend entirely upon locality, but, since the case of Waring vs. Clark, 5 Howard, 441-464, the exception of *infra corpus comitatus*, is not allowed to prevail."

Prior to the case of the Gennessee Chief, 12 Howard, 443, locality was restricted to torts within the ebb and flow of the tide. This case, however, extended the locality to cover all navigable waters.

In the Blackheath Case, 195 U. S. 361, the jurisdiction is extended to cover an injury to a beacon light on the ground that it is a Government aid to navigation.

However, in the cases of Cleveland, Etc., R. R. Co. vs. Cleveland Steamship Co., 208 U. S. 316, and The Troy, 208

U. S. 321, which shortly follows the Blackheath Case, and in which injuries were caused by vessels to drawbridges, Admiralty jurisdiction was denied, but on the ground that the bridges were aids to commerce on land. The old "Locality Test" of the Plymouth Case being still maintained and the cases distinguished from the Blackheath Case.

In the case of Simmons vs. The Steamship "Jefferson," 215 U. S. 130, jurisdiction is extended to cover a ship in dry-dock, where the water had been entirely withdrawn.

The most recent Supreme Court case is the case of Martin vs. West, 222 U. S. 191. This case involved a collision between a vessel and a supporting pier of a bridge over a navigable highway of the United States, caused by the negligent management of the vessel and resulting in the collapse of the span of the bridge and its fall into the stream. This case upheld the "Locality Test," but denied Admiralty jurisdiction, because of the fact that the bridge was attached to realty and an aid to commerce on land.

The "Locality Test," we respectfully submit, is supported by numerous considerations, both of convenience and reason, as well as by the overwhelming weight of judicial authority. The *certainty* secured by this test is in itself a sufficient argument therefor. If the consideration as to the character of the tort committed upon navigable waters is allowed to enter, there must necessarily be confusion and a vast increase of litigation. In every case where the libellant has proved successful, the respondent will endeavor to show by technical and artificial methods of reasoning, that the tort complained of was not in reality *maritime* in its nature. The petitioners ask whether cases of assault, battery, slander, etc., committed upon navigable waters would be the proper subject of Admiralty jurisdiction. They contend that there has never been a case in which the jurisdiction over such torts has been sustained.

The petitioner's argument is based solely upon such deductions as can be made from the entire *absence* of adjudications, either one way or the other. They have not been able to produce a single adjudicated case in which jurisdiction over such torts has been denied.

We, therefore, respectfully contend that their deduction is not a logical one; that the absence of adjudications would rather indicate, that if controversies of this kind have been brought into the courts, the parties have preferred to have them heard by a jury in the law courts, in view of the fact that they involve no principles peculiar to maritime law, or as Judge Rose in the District Court says in his opinion (Imbrovek Record, page 93):

> "It must be borne in mind, however, that when the boss stevedore was pecuniarily worth suing, he could be conveniently sued in the State Court. Most lawyers who make a specialty of personal injury cases prefer to try them before juries. There may be a number of cases in the district courts, as there has been at least one in Maryland, in which the jurisdiction seemed to the judge so clear as not to justify an opinion."

Third—The Constitutional Extent of Admiralty Jurisdiction is Involved.

As we have heretofore stated, the trend of the decisions of this Court has been to broaden, rather than to limit, the Admiralty jurisdiction of the Federal Courts. The "subject-matter test" in the case of Admiralty jurisdiction over contracts, rather than the "locality test," was an undoubted extension. If the decisions of this Court were otherwise, and Admiralty jurisdiction was limited ~~a restriction either~~ over torts as is the contention on behalf of the petitioner in the present case, we respectfully submit that it would be impossible to extend jurisdiction to torts of *every kind and*

species when occurring on navigable waters, except through an amendment to the Constitution of the United States.

The Constitution declares that the federal power of the United States shall extend "to all cases of Admiralty and Maritime jurisdiction" (Article 3, Section 2, Clause 1), without in any way defining the limits of that jurisdiction.

The Federal Congress by the judiciary Act of 1789 established the District Courts and conferred upon them "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction." In other words, the grant of admiralty and maritime jurisdiction by Congress to the Federal Courts in civil cases is co-extensive with the gift to Congress by the Constitution itself

(1) *Comparison with Decisions upon Criminal Jurisdiction of Federal Courts in Admiralty and Maritime Cases.*

The Constitution does not in express terms confer upon Congress the power to legislate with regard to matters maritime, but by *Article* 1, *Section* 8, *Clause* 10, there is conferred upon Congress the power to define and punish piracies and felonies committed on the high seas. The right of Congress to define and punish felonies upon other waters than the high seas is derived from the declaration of the Constitution, *Article* 3, *Section* 2, *Clause* 1, which is the grant to the judiciary of jurisdiction over all cases of admiralty and maritime jurisdiction, a jurisdiction which has been held to be entirely exclusive and has been construed to give the Federal Legislature a power over the law which the Federal Courts are thus called upon to interpret and apply. For this reason Congress under the above mentioned admiralty and maritime jurisdiction clause has vested in the Federal Courts jurisdiction over numerous crimes, such as murder, robbery, assault with intent to kill and misdemeanors, irrespec-

tive of their maritime nature, which arise upon navigable waters. By the first Crimes Act passed by Congress in year 1790 (Act of 1790, Chapter 9, Paragraphs 7 and 8) punishment was provided for *manslaughter* when committed on the high seas and for *murder* when committed either on the high seas or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State. The Supreme Court decided that "the particular State" intended was a State of the United States, and not a foreign country.

U. S. vs. Brailsford, 5 Wheaton, 184.

The Court further held that a navigable tidal river in China was not a part of the "high seas," consequently a person could not be lawfully convicted of *manslaughter* committed upon an American ship on such a river.

U. S. vs. Wiltberger, 5 Wheaton, 76.

Chief Justice Marshall in this case did not for one moment *question the power of Congress to legislate* upon this subject. As a result of this decision the Crimes Act was redrafted in 1825 (Act of 1825, Ch. 65, Par. 4), and extended the application of the Act not only to the high seas, but to any arm of the sea or to any river, haven, creek, basin or bay if within the admiralty jurisdiction and without the jurisdiction of any State. Admiralty jurisdiction was thus extended over all the arms of the sea.

U. S. vs. Grush, 5 Mason, 290.

None of the authorities from that day to this have *doubted* the *power* of Congress to legislate as to all offenses occurring upon navigable waters.

U. S. vs. Wilson, 28 Fed. Cases, 718;
Miller's Case, 17 Fed. Cases, 300.

It is true that Congress has wisely refrained from interfering with the State Court's jurisdiction over such offenses as were committed upon the navigable waters of the State and upon the sea within a marine league of their shores.

U. S. vs. Bevans, 3 Wheaton, 336;
Manchester vs. Massa, 139 U. S. 240.

In the case of the *United States vs. Rodgers,* 150 U. S. 255, the accused was charged with making an assault with a deadly weapon, while aboard a ship upon that part of the Detroit River which is within the jurisdiction of the Dominion of Canada, and consequently without that of any particular State. There was no statute making an assault with a deadly weapon punishable unless the Detroit River was held to be a river "connected with the high seas." The majority of the Court held that the Great Lakes with which the Detroit River connects were "high seas." Two justices (Gray and Brown) very strongly dissented, but they did not question the right of Congress to punish offenses which were committed upon navigable waters; they simply pointed out that Congress had not seen fit to exercise its power to do so. As a result of this decision, the Act of September 4, 1890, Ch. 874, was passed which was entitled "An Act Extending the Criminal Jurisdiction of the Circuit and District Courts to the Great Lakes and their connecting waters." We feel, therefore, that it is safe to assume that Congress has the power to provide for the punishment of *all offenses* committed *upon navigable waters.* It has never been suggested that this power is limited to offenses or persons which or who are connected in any way with the ship upon which the deed is committed. Jurisdiction to redress such offenses is *exclusively territorial in character.* Since Congress may therefore provide for the punishment of *all* crimes committed within admiralty jurisdiction, and it has given the district Courts cognizance of *all* civil cases of admiralty and maritime juris-

diction we confidently claim that it follows as a necessary deduction that those Courts on the civil side have now jurisdiction over all torts committed upon the waters over which Congress can exercise criminal jurisdiction.

If it were otherwise, it would follow that the Admiralty Courts could never be clothed by the Federal Legislature with jurisdiction over *all* civil wrongs, regardless of their nature, occurring on navigable waters. *It will be noted that Congress has in fact given the District Court jurisdiction over* ALL *civil cases "of admiralty and maritime jurisdiction."*

Since this language is that of the Constitution itself, this grant is as broad as Congress can *constitutionally* make it, if it be held now that the grant does not include *all* civil wrongs independent of contract, consummated on navigable waters, it follows that the jurisdiction over such wrongs could only be effective by Constitutional Amendment. We would therefore have this anomalous situation; that Congress could attach *criminal* liability to certain acts, regardless of their nature, committed on navigable waters, but would be without the power to attach *civil* liability to the same acts.

FOURTH—THE TORT IN THIS CASE WAS ESSENTIALLY MARITIME IN ITS NATURE.

Granting solely for the sake of argument that this Honorable Court should be of the opinion that "locality" is not the sole test of Admiralty jurisdiction in cases of tort, but that this test should be qualified by showing the relation of the parties to the ship or vessel, we respectfully urge that in the case at bar the libellants were injured not only in a maritime locality (upon navigable waters), but while in performance of maritime services. The claim of a stevedore for services rendered in loading and unloading a vessel is clearly for a maritime service essential to the purpose of

the voyage, and according to the great weight of authority, especially the more recent cases, is within the jurisdiction of Courts of Admiralty. To receive and deliver the cargo are as much a part of the undertaking of the ship as its transportation from one port to another. To say that the service rendered is not a maritime service because the final delivery is on shore, is begging the question, as the *nature of the service* and not the *place* where rendered should determine its character, in this respect.

Although this Court, as far as we have been able to ascertain, has never passed directly upon this question, however, in the case of Insurance Company vs. Dunham, cited above, the established doctrine was laid down that whether a contract for service was maritime or not depended not on the place where the contract was made, but on the subject-matter of the contract, if that was maritime the contract was maritime. This case has been followed in a number of cases sustaining the maritime nature of contracts for stevedore services.

Even after the services of the stevedore were decided to be maritime in their nature, a maritime lien to enforce their payment was denied when the services were rendered in the vessel's home port.

"The Gilbert Knapp," 37 Fed. 209.

The lien being allowed, however, when they were rendered to a foreign vessel.

George T. Kemp, 10 Fed. Case, 5341.

The services are now, however, considered so maritime in their nature that the lien is granted without reference to the port in which the services are rendered.

"The Segurranca," 58 Fed. 908;
"The Mattie May," 47 Fed. 69;
"The Senator," 21 Fed. 191;
"The Coningsby," 202 Fed. 814.

The stevedore is the natural descendant of the crew. Formerly the crew itself loaded and unloaded the vessel, but as commerce progressed there was a demand for quicker and more efficient service and for an opportunity to be given to the crew to rest and make preparation for future trips, thus the stevedore came into existence.

It is therefore respectfully submitted that even if the character and nature of the tort, in addition to the locality, is to be considered in determining whether or not admiralty has jurisdiction, the tort complained of in the case at bar is distinctly of a *maritime nature.*

Point II.

A—As to Question of Evidence.

In the Petitioner's Brief, under Points II, III and IV, the second assignment of error is taken up under three sub-headings. The second assignment of error was as follows:

That there is no evidence to show that the accident and the consequent injury resulted from the negligence of the appellant, the Stevedore Company.

The above-mentioned sub-headings therefore raise the question on the merits of the case. This is a question dependent upon the general law of master and servant in its application to the facts of the case and not upon the maritime law nor upon the jurisdiction of the Courts of the United States, nor the interpretation of any federal statute or treaty.

First—*Questions of evidence intended to be submitted to the* **final** *jurisdiction of the Circuit Court of Appeals.*

As has been heretofore stated in the "Introductory Statement," these cases are in this Honorable Court upon *cer-*

tiorari, the application for which was based upon the alleged conflicting decisions of two Circuit Courts of Appeals on the question of admiralty jurisdiction. But for this circumstance, we respectfully contend, the decision of the Circuit Court of Appeals would be final. It is argued, therefore, that the case at bar, on its merits, is of a character, which, under the Judiciary Act of 1891, was intended to be submitted to the *final jurisdiction* of the Circuit Court of Appeals, and that if this Court decides the question of jurisdiction in favor of the respondents, it will, so far as the merits of the case are concerned, go no further than to inquire as to whether *plain error* has been committed by the two subordinate Courts.

In support of this we wish to refer this Honorable Court to the case of *Chicago Junction Railway Company vs. King,* 222 U. S. 222.

In this case the plaintiff had recovered for personal injuries in a cause of action based upon the Federal Safety Appliance Act and the defendant appealed from the judgment of affirmance in the Circuit Court of Appeals for the Seventh Circuit. The principle contention by the appellant was that the plaintiff had been guilty of contributory negligence in going between the cars of his train. This Court, while conceding its jurisdiction to review this case on appeal, "because the cause of action as stated in the pleadings, rested upon the Safety Appliance Law" added "the questions now presented in a broad sense are of a character which ordinarily it was the purpose of the Judiciary Act of 1891 * * * to submit to the final jurisdiction of the Circuit Court of Appeals." The Court then described the extent to which it would review the facts in these words (speaking through Chief Justice White, page 223):

> "Under the conditions just stated, we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw there-

> from inferences which may possibly conflict with the conclusions of the courts below as to the tendencies of the proof. We are of this opinion because in this and cases like it, that is, in cases where the conditions are in all respects identical with those here presented, we think our whole duty will be performed by giving to the record such examination and consideration as may be necessary to enable us to determine whether plain error was committed by the Court below in any of the particulars complained of."

The same rule was applied in the case of *Texas and Pacific Railway Company vs. Howell*, 224 U. S. 577.

These cases were cited and followed in the recent case of *Chicago, Rock Island and Pacific Railway Company vs. Brown*, 229 U. S. 317 (June 10, 1913).

That this Court, in Admiralty cases, will not reverse the concurring decisions of two subordinate Courts upon a question of facts, unless shown to be clearly erroneous, is the decision in the case of *"The Iroquois,"* 194 U. S. 240, where this language is used (page 247):

> "We regard the case as peculiarly one for the application of the general rule so often announced by this Court, both in Equity and Admiralty cases, that this Court will not reverse the concurring decisions of two subordinate Courts upon questions of fact, unless there be a clear preponderance of evidence against their conclusions."

Vide also—

"The Conqueror," 166 U. S. 110;
"The Carib Prince," 170 U. S. 655.

These principles of law are closely applicable to the present cases, the questions involved being of such a nature as would have been submitted to the final jurisdiction of the Circuit Court of Appeals for the Fourth Circuit, but for the fact that a question of admiralty jurisdiction was presented.

Unless, therefore, in the cases at bar, the two subordinate Courts can be found to be clearly erroneous in their findings of facts, we respectfully submit that this Honorable Court will not interfere with such findings, especially in view of the fact that the District Court had the witnesses *personally* before him and none of the testimony was taken by deposition.

Furthermore, a brief review of the evidence would suffice to show that the lower Courts were thoroughly supported in their findings upon the facts. We will, therefore, take up the sub-headings of the Petitioner's Brief in their order:

SECOND—*Evidence discussed.*

(1) The Master Failed in His Duty to Provide a Safe Place.

It will not be necessary to discuss the question of whether or not the duty of the master of exercising reasonable care to furnish a reasonably safe place in which the servant is to work is a *non-delegable* duty. The petitioners admit this in their brief. Their contention is rather that the evidence in this case fails to show that the master did not perform his duty in providing such a place, that the master did supply his employees with all necessary appliances in order to make the place of work a reasonably safe one and that any failure to make this place safe was due to the improper use or non-use of these appliances by the co-employees, for which the master was not responsible. In other words, that so far as *construction* was concerned, the master had fulfilled his entire duty, and that any subsequent defective or dangerous condition of the premises was the result of the operation or provision in the details of the work, for which the master is never responsible.

As we have stated under the heading "Statement of Facts," there is not a particle of evidence to show that the bolts or

pins which fastened the cross-beams to the hatch combings were in place when the ship arrived in Baltimore and the stevedore took possession of the ship. In fact, the head foreman for the Stevedoring Company, Bartholl testified (Imbrovek, Record, page 77), that he did not pay any attention to whether the bolts were in or not.

Under these circumstances, the libellants, who as this Honorable Court well knows, are the most ignorant class of men, in most cases unable to speak a word of English, were directed to go below and perform their duties in a place, which could have been made safe in five minutes, when on the other hand the stevedore admits that he did not pay any attention, in fact did not know whether the place was safe or not. In order to escape liability, the appellants in their brief contend that inasmuch as there was on board the ship all the necessary appliances to make the place safe, any dangerous condition of the premises was the result of the details of the work performed by the co-employees of the libellants. They state (Brief, page 29) referring to the ship: "She was therefore, upon her arrival a safe place in which to work. If therefore, she became unsafe, it must have occurred from something that the servants did or omitted to do." As a matter of fact, there is not one particle of evidence to show that *the place wherein the libellants were to work was ever a reasonably safe place.* If the testimony had shown that at the time the ship came into the port of Baltimore the bolts were in place, the question might be raised that the place was safe at that time. However, in the case at bar, the entire attention of the stevedore company was directed to protecting the cargo, and although it was unnecessary to leave the hatch covers on below the top deck, in order to save expense, only the middle section was removed. It is confidently claimed that the master failed utterly to fulfil his duty in furnishing a safe place to his employees.

It is a well-recognized principle of law as laid down by the Federal decisions, that where there are two methods of doing work, and one of them is dangerous and the other safe, the employees in choosing the former method represent their master in the non-delegable and non-assignable duty of maintaining and providing a safe place for their fellow-employees.

In *Gaynon* vs. *Klander-Weldon Dyeing Machine Co.*, 174 Fed. Rep. 477, a case where a piston head was sent to a blacksmith to be heated, in order that a larger piston rod might be inserted in it, and the person sending the piston head neglected to inform the blacksmith that it would be necessary to make a vent in the piston head in order to prevent an explosion, an accident occurring, the Court on page 485 says:

> "It is undoubtedly true that a master who employs competent superintendents and foremen may leave the execution of the details of the work to them, and it is not required to oversee the details, and that where there are different methods of doing certain work, it may leave it to them to select the method, but if some methods or processes are dangerous, and others not dangerous, and this is known to the master and the selection of method is left to the foreman in charge, and he is at liberty, as was the case here, to adopt either method, and he adopts the dangerous one and directs the work to be done in that way, he represents the master in so doing, and the selection of mode or methods is the act of the master as much as if he were personally present and made the selection, and as it would be negligence for the master to set the ignorant workmen to the execution of the work in that manner without warning or instructions, so it would be his negligence should the vice-principal or foreman set the ignorant employe to do work according to the dangerous method without warning or instruction as to the danger."

In 26 Cyc. 115, we find this language:

> "* * * yet as a general rule a master will not be held responsible for injuries to a servant in the course of his employment where the usual and customary methods of work are employed, *provided such methods do not disregard the safety of the servant.*"

See also—

O'Brien vs. Buffalo Furnace Co., 183 N. Y. 317.

What constitutes a reasonably safe place under certain circumstances would not do so under others; the different surroundings and circumstances must be taken into consideration in order to determine whether or not the master has exercised reasonable and ordinary care in furnishing a safe place for his employees to work in. This question has therefore been left to the determination of the jury under proper instructions from the Court.

In *Grand Trunk R. R. vs. Ives*, 144 U. S. 408, on page 417, the Court says:

> "There is no fixed standard in the law by which a Court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under any and all circumstances. * * * What may be deemed ordinary care in one case, may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions of the Court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs."

When a master employs a servant, he impliedly engages with him that the place in which he is to work and the machinery and appliances with which he is to work, or by which he is surrounded shall be reasonably safe and the employee

has a right to assume that this duty has been fulfilled by the master, and it is the master's positive duty to the employee to do so.

B. & O. vs. Baugh, 149 U. S. 368.

In the case at bar, the District Court after hearing the testimony concluded that the place in which the libellants were working was not a safe place, and that the failure of the master to provide for an inspection of the premises, or to promulgate any rules or orders with regard to the proper protection of its employees constituted negligence. In fact, it is respectfully urged that on a perusal of the Record in this case, it will be noted that the District Court was greatly impressed with the apparent disregard of human life exhibited by the head foreman of the stevedore company. This disregard almost amounted to criminal negligence. He did not care whether the bolts were in or not; his sole duty was to hasten the work, protect the cargo and save expense. In the language of the District Coutr (Imbrovek Record, pages 95 and 96):

> "The stevedore was bound to use due diligence to see that the libellants had a safe place in which to work, if it had issued orders to the foreman or its gang boss that they were not to allow the men to work under partly covered hatches where the pins were out, then if these instructions were disobeyed, the negligence would be the negligence of the gang boss.
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> * * * * * * * * * *
>
> "There is no evidence that any such orders, whether general or special, were ever issued."

We submit, therefore, that the master failed entirely to provide a safe place for his employees to work in.

(a) Lenk, the Gang Boss, a Vice-Principal.

Although in view of the circumstances of the case at bar, it does not seem necessary to determine whether or not the gang boss was a fellow-servant of the libellants, we respectfully contend that Lenk, the gang boss, was a vice-principal of the respondent corporation, and that his negligence was its negligence.

With regard to the doctrine of vice-principal, the Federal Courts have decided that neither the grade nor rank of employment, nor the control over other employees, or the power to hire or discharge determine the question of whether or not an employee is a vice-principal. *The real test is, whether the character or nature of the act done is such as in itself to impute negligence on the part of the master.* Therefore, where the act is such that it affects the vital interests of the employees, the employee who has the power to do this act, is, as to such act, a vice-principal of the master. In other words, if the negligence complained of consists of acts done or omitted by the employee having authority, which relate only to his duties as co-laborer with those under his control, and which might just as readily occur with one of them, who had no authority, the common master is not liable. If, however, the negligent acts are the direct result of the exercise of the authority or discretion conferred upon him by the master over his co-employees, the master is liable.

In the case of *Peters vs. George,* 154 Fed. Rep. 634, the Court says on page 639:

> "While at one time the so-called theory of vice-principal was much resorted to, in working out the liability of a master for injuries to an employee incurred in his service, it has, subsequently to the decision of the Ross Case, 112 U. S. 377; 5 Sup. Ct. 184; 28 L. Ed. 787, been largely discarded, at least in the Federal Courts, and the distinction between negligence, that is, to be imputed to the master, and that which is to be considered

as merely and solely the negligence of a fellow-servant, has been placed upon a more satisfactory and rational basis. In the opinion of Mr. Justice Brewer, delivering the judgment of the Supreme Court in B. & O. R. R. Co. vs. Baugh, 149 U. S. 368; 13 Sup. Ct. 914; 37 L. Ed. 722, the whole subject has been instructively discussed, and it has been clearly and logically settled upon what grounds a master may be held liable for injuries incurred by a servant in the course of his employment. The question is always, whether the negligence charged is the neglect of a primary and absolute duty of the master to the servant. If such be its character, no delegation of the performance of that duty to another, no matter how inferior his rank may be in the master's service, can as we have already said, relieve the liability of the master for its neglect. The master does not insure the safety of the servant, but he does undertake that the place in which he works, and the appliance with which he works, shall be reasonably safeguarded. A dereliction of the humblest employee in the master's service, to whom any part of such duty has been delegated, is the dereliction of the master."

In the case at bar, the gang boss was, according to the testimony, the man to request the officer of the ship to direct the ship's crew to place the bolts in such hatch covers as were left in position. This act could not be performed by any of the gang boss's co-laborers. It was an act which involved the protection of the co-laborers, and as to this act the gang boss or foreman, by whatever name he might be called, was a vice-principal.

In addition Lenk did have complete control of the work of loading and unloading. He had the power to employ and discharge the men under him.

(b) Bartholl, the Head Foreman, a Vice-Principal.

Bartholl, the Stevedore Company's sole witness, although not present at the time of the accident, appears to have been

the *sole representative* of the company, and to have had entire charge of the work of loading and unloading the ships.

In the language of the District Court (Record, p. 96):

> "The testimony in all events does not show what other human being acted for the corporate respondent. He undoubtedly occupied the position of vice-principal."

The duty of giving warning of the dangerous nature of the employment, or instructions as to such dangers and the proper method or manner of doing the work, in order to avoid them, and the duty of inspection, are all duties which rest upon the master, and *cannot be assigned or delegated* by him so as to exonerate the master in case they are not performed. Bartthol, the sole representative of the respondent company, was the only person to give such instructions and to provide for the making of inspections, and he failed to do so.

The appellants contend in their brief that no testimony has been adduced to show what Bartholl's duties were, except such as can be gathered from his statement that he had a gang at work in the particular hatch.

Is it incumbent upon the libellants to show what the exact duties of the head foreman were? He testified that he was in charge of the disposition of the various gangs. He did not have to report to any one, was, apparently, in complete control of the work. Irrespective of whether this Honorable Court should believe that Lenk, the gang boss, was a *vice-principal* or a *fellow servant* it was Bartthol's duty to instruct him to make a proper inspection of the hatch covers, and if he failed to instruct him, his negligence was the negligence of his master. He testified definitely that he not only *did not instruct* any one, but that he *did not care* whether the pins were in the hatch covers or not. Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent in supplying and maintain-

ing suitable instrumentalities for the work required is a breach of duty for which the master is liable.

Mullan vs. Phil. & South Mail S. S. Co., 78 Pa. St. 25;

(2) Evidence as to the Proximate Cause of the Accident.

The evidence adduced on behalf of the libellants is uncontradicted that the accident could not have happened if the bolts or pins had been in place. The expert, Frank Priehler, stated that the hatch sections with bolts would be much safer. William Mayerowisez, another witness, testified that the accident could not have happened if the bolts had been properly fixed, and also stated that he examined the hatch immediately after the accident, and found that it did not have any bolts at all.

The only testimony that the accident could have happened in any other way, was that adduced by the respondent corporation when Bartthol, its witness, who was not present at the time of the accident, testified that the accident in his opinion might have happened in one of two ways, either

(1) By the failure to properly steady the net as it was raised from the hold, or

(2) Failure to properly shackle the net to the hook.

These were only theories, or suppositions. There is not a particle of evidence to show that the net was not properly steadied in its ascent, nor that the shackles were not properly hooked. Two eye witnesses swear that the net was hooked on.

The District Court in its opinion says (Imbrovek Record, page 95):

> "As I saw and heard the evidence, I was convinced that so soon as the accident happened every one except the laborers themselves thought of the pins."

(3) Evidence as to Safety of Place to Work.

The fact that Bartthol testified that no such accident had ever happened in his experience has little value. There is no testimony to show how often work of this character had been carried on under similar conditions without the pins in position, and as the District Court in its opinion (page 95) says:

> "Even if that had been frequently done, it would have tended to show that the stevedore had been fortunate rather than prudent."

We confidently claim, therefore, that the findings of the District Court are entirely supported by the evidence in the case.

CONCLUSION.

It is therefore respectfully submitted that the decrees of the Circuit Court of Appeals in these cases should be affirmed.

Respectfully submitted,

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